GEORGIAN YOUNG LAWYERS' ASSOCIATION

№15

MONITORING OF CRIMINAL TRIALS REPORT

MONITORING PERIOD: MARCH 2020 - MARCH 2021

MONITORING OF CRIMINAL TRIALS REPORT №15

(IN TBILISI, KUTAISI, BATUMI, TELAVI, RUSTAVI AND ZUGDIDI COURTS)

Monitoring period: March 2020 - March 2021

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INTRODUCTION

The purpose of GYLA's Criminal Court Monitoring reports is to improve the quality of the criminal justice system in accordance with the standards of a fair trial and protection of fundamental human rights and freedoms. The monitoring reveals gaps and challenges in litigations, as well as positive trends. As a result of the evaluation of the identified findings, the report offers relevant practical and legislative recommendations.

The reporting period covers the period from March 2020 to March 2021. The present court monitoring report is distinguished by the fact that it fully coincides with the one year-period of the onset of the Covid-19 pandemic, which has significantly changed court proceedings.

With the view to preventing the transmission of Covid-19, the court, in addition to holding trials in the courtroom, had to move to remote case proceedings, which proved to be a test for the fair trial and transparency of the judiciary. Besides, the pandemic has exacerbated certain gaps that have existed for years in the justice system.

In the first stage of the transition to virtual hearings, the court failed to ensure the principle of publicity. For two months after the pandemic hit, court hearings remained inaccessible to stakeholders. GYLA's appeal to the High Council of Justice[1] and several courts[2] to allow the monitors to be present at court hearings was futile.[3]

In the following months, the courts gradually started to allow the interested parties to attend hearings remotely and/or in the courtrooms. Most judges and court staff (hearing secretaries, assistants) were eager to ensure the publicity of court proceedings, yet some individual judges were able to make arbitrary decisions under the pretext of fighting the spread of the pandemic in order to unreasonably restrict the presence of monitors both physically and remotely.

1 Application №გ-01 / 37-20 by the Georgian Young Lawyers' Association 02/04/2020.

2 Application №გ-01 / 44-20 by the Georgian Young Lawyers' Association 04/05/2020.

3 The reply of the High Council of Justice of Georgia, 07/04/2020, Application №305/995-03-ო. Application №4212-2 by Kutaisi City Court 11/05/2020. The reply of Batumi City Court, 11/05/2020, Application №313-გ/კ. The reply of Rustavi City Court, 06/05/2020, Application №440/გ.

The quality of virtual or partially virtual court trials is quite problematic, which is largely caused by technical issues. The deficiencies mainly arose due to internet connection problems, software failures, and image or sound problems, especially when defendants were joining the trials from penitentiary facilities.

Due to technical problems, court sessions were postponed or delayed more frequently than in the previous years. This further aggravated the situation with the deliberation of cases within reasonable timeframes.

Penitentiary facilities are not yet equipped with the required number of technical means for remote trials, and the problem is also the lack of personnel knowledgeable in how to use the equipment.

The observation has shown that proper examination of evidence during virtual court hearings is quite difficult, especially the questioning of witnesses and the examination of physical evidence. When interviewing a witness remotely, it is first and foremost to identify the witness, but the risks of undue influence on witnesses are not eliminated, especially when they join the trial from a penitentiary facility or an administrative unit of the police, as well as the lawyer's office.

It has been revealed that the pandemic-induced conditions made it difficult for defendants and their lawyers to communicate properly. In several cases, lawyers were unable to contact the accused and agree upon their positions prior to the court hearing. Some remote court hearings jeopardized the confidentiality of the lawyer-client conversation as the lawyer's consultation with his or her client was available to third parties.

Insufficient judicial control has been a problem for years with regard to the application of preventive measures, the examination of the lawfulness of the detention of the accused at the first court hearing, and plea agreements. The court's tendency to use pre-trial detention or bail as a measure of restraint in almost all cases is maintained. Literally, no other alternative measures of restraint are applied, which is due to the scarcity of alternative preventive measures offered by the legislation, as well as the lack of efforts shown by the parties and the court in practice. Cases of leaving the accused without a measure of restraint are also very rare.

During the reporting period, the number of defendants appearing before the court as detainees slightly decreased. However, the judges are not consider the lawfulness of the detention at the first court hearing on their own initiative unless the defense lawyer submits a motion requesting to do so. The law does not

provide for an independent appeal mechanism against a decision on the lawfulness of pre-trial detention. The court must exercise strict judicial oversight at the first appearance court hearings regarding any arrest carried out on the grounds of urgency or with a prior warrant of the court.

The monitoring shows that the court less thoroughly checks the fairness and lawfulness of a sentence specified in the plea agreement. There was only one case when the court refused to approve the plea agreement, in other cases, the judge accepted the agreement reached between the parties without even displaying the slightest doubt about it.

The court monitoring has shown that during the periodic review of pre-trial detention, judges in almost all cases leave the imprisonment in force and for the most part fail to justify the inevitability of prolongation of the custody.

The possibility of identifying facts of ill-treatment in remote court trials is complicated. If the defendant is not physically present in the courtroom, judges need to show more effort to determine whether the accused has been subjected to ill-treatment by law enforcement bodies. The involvement of the defendant in the court trial from penitentiary facilities and police units increases the likelihood that the accused may refrain from providing the information about ill-treatment to the court for the fear of psychological pressure or further physical abuse from the same and/or other staff members.

We hope that the findings and recommendations presented in the report will help the parties involved in criminal proceedings to conduct litigations in accordance with the high standards of human rights protection and fundamental principles of the criminal procedure law. We also hope that the shortcomings identified in the past years will be eliminated, as well as the problems associated with virtual case proceedings will be resolved in a timely manner, and among other things, relevant provisions will be added to the legislation for the effective implementation of remote court hearings.

METHODOLOGY

Georgian Young Lawyers' Association (GYLA) has been implementing court monitoring since 2011. As of today, GYLA has prepared fourteen reports on the monitoring of criminal proceedings, as well as a special report – "The court during the pandemic."[4] The presented report №15 offers the results of observations on criminal proceedings in six courts,[5] from the period of March 2020 through March 2021.

This report is the first among the court monitoring reports which is based on mixed-type observations. In particular, GYLA's monitors observed court hearings remotely, using electronic means during hearings, as well as directly in the courtroom. The monitors in both cases used questionnaires specifically designed for the project. All the information presented in the monitoring reports has been obtained as a result of attending and observing court trials. The GYLA's monitors did not communicate with the parties nor did they review case materials or final verdicts delivered by the courts. The questionnaires included closed-ended questions requiring "yes" or "no" answers as well as open-ended questions that allowed the monitors to interpret and record the results of their reflection in detail. Besides, the GYLA monitors, in some cases, made transcripts of court hearings and particularly important motions to add more clarity and context to their observations. Through the procedure, the monitors were able to collect impartial, measurable data and identify other important facts.

The compliance of the court's activities with the international standards, the Constitution of Georgia, and the applicable national laws was evaluated by GYLA's analysts. The report does not review or process all court proceedings or hearings, yet the information presented contains important and noteworthy data for members of the judiciary, the Prosecutor's Office, the Bar Association of Georgia, as well as for representatives of the legislative and executive branches of the government. Furthermore, the factual circumstances of cases, the statements made by the participants of court trials, and the content of case materials did not fall within the scope of the court monitoring; namely, GYLA did not analyze the circumstances concerning specific criminal cases to determine the guilt or innocence of the individuals. Given the length of criminal proceedings and the various stages therein, the GYLA observers attended individual trials on a random

basis rather than all hearings. However, there were several exceptions:

- The **so-called "high-profile"** cases that concerned former political figures;
- The cases involving **gross violations of human rights, cases of high public interest, or other specific factors.**

From March 2020 through March 2021, GYLA observed 2111 court trials, among them:

- Merits hearings - 993;
- Plea agreement court hearings - 278;
- Preliminary court hearings - 444;
- Prevention measure court hearings - 396.

KEY FINDINGS

The impact of Covid-19 on the court

- The Covid-19 pandemic had a significant impact on the right to a public trial in the reporting period. Initially, between March and May 2020, access to court trials was completely restricted for those interested. Since the end of May 2020, GYLA has been able to observe public hearings in various ways, remotely or by attending trials in the courtroom, although not in all cases the publicity of the hearings was ensured.

- Information about trials is not always published. This is particularly acute with respect to the first appearance court hearings.

- Information about 282 (71%) out of 396 first appearance court hearings and 51% of the plea agreement sessions was not publicly available. The information about preliminary trials and merits hearings was better provided. Information on pre-trial hearings was not published in 6% of cases, and in 12% on main hearings.

- The monitoring of court trials shows that involving inmates in virtual court hearings from penitentiary facilities is problematic. Insufficient technical equipment and a shortage of knowledgeable personnel lead to the queues of prisoners, resulting in frequent postponement and delayed start of trials. For this reason, 135 (27%) out of 471 court hearings were delayed.

- The biggest challenge of virtual court trials is technical shortcomings, mostly related to the software required for remote case proceedings. Technical problems were observed in 156 cases, of which 146 (94%) were remote trials.

- Examination of the evidence in remote court hearings is problematic as well. Only 6 cases were reported where physical evidence was examined at the virtual trial. At the request of the parties and with the consent of the court, the hearings were mostly adjourned and held in the courtroom for the purpose of examining the material evidence, as in its essence, inspecting the material evidence means opening the sealed evidence in the courtroom, checking and verifying the relevant number on the seal, identifying the specific traces and features on it, which is literally impossible to ensure in a hybrid court trial.

- In 180 cases, witnesses were interviewed at a remote court hearing. The monitoring has proved that interrogating witnesses remotely involves certain risks; in particular, the court finds it difficult to be assured whether or not someone is sitting next to the witness dictating how to answer specific questions and/or whether the witness is reading a text prepared in advance.

- In 7 cases the witnesses were interviewed from the police unit. This created suspicions that the police station could have been inflicting psychological pressure on the witnesses coercing them to provide a testimony favoring the prosecution and/or a statement prepared in advance.

- The pandemic has further exacerbated the problem with effective communication between the lawyer and the defendant. The confidentiality of the communication between the lawyer and his or her client was at risk during the virtual trials.

- Due to the pandemic-related constraints, new provisions were introduced to the criminal law; two new crime compositions were added to the Criminal Code - Article 248[1] of CC (violation of isolation and/or quarantine rules) and Article 359[1] of CC (violation of the state of emergency or martial law).

- The analysis of 25 court judgments requested in relation to the above two articles and the results of the observations of the court hearings prove that in all cases individuals charged with the violation of the isolation and/or quarantine regulations were found guilty.

- Individuals charged with the above articles were sentenced to lighter punishments as a result of merits hearings as opposed to the sentences imposed under plea agreements.

The first appearance court hearings

- The GYLA monitors attended 396 first appearance court hearings with the participation of 464 accused. During the entire reporting period, the rate of using bail and imprisonment as the preventive measures totaled 98%. 442 accused out of 464 were imposed a form of restrictive measure. In 196 (44%) cases, the court approved bail, ordered remand detention against 240 (54%) persons, and agreement on not to leave the country and behave appropriately for 6 (2%) defendants. In **none of the cases was the personal surety** applied by the court.

- In 22 court hearings against 22 (5%) defendants, no measure of restraint was applied. In 16 (3%) of these, the court did not accept the motion of the prosecution and declined the request to apply any restraint measure against the accused. In the remaining cases, the Prosecutor's Office did not petition for any restraining order, as the defendants had already been remanded in custody for another crime.

- Pre-trial detention imposed against 66 (27%) persons and bail applied to 71 (36%) persons during the reporting period was unsubstantiated or the expediency thereof was not properly substantiated at the court hearings.

- The prosecution requested the detention as a measure of restraint against 333 (72%) defendants, which the court did not grant in the case of 93 (28%) accused persons.

- In the reporting period, the court used bail secured with pre-trial detention in 81 (41%) cases. Of which, the so-called custodial bail applied against 27 (33%) defendants was unsubstantiated or insufficiently substantiated.

- The Prosecutor's Office filed 85 (43%) motions requesting the bail as a measure of restraint, in 73 (86%) cases the court did not deem the motion to be substantiated and reduced the amount of bail.

- In merely 2 out of 85 (43%) motions for the bail, the prosecution requested the minimum amount of bail (1000 GEL).

Proper judicial control

- In the reporting period, 299 (64%)[6] defendants appeared as detainees at 256 first appearance court trials. The monitoring revealed that 16 (5%) accused were detained based on a prior ruling of the court and 27 (9%) on the ground of urgent necessity.

- In the case of 255 (86%) arrested defendants, it is unknown on what basis they were detained, because the issue of detention was neither discussed nor even mentioned at the hearing by the judge.

6 During the reporting period from March 2016 through February 2017, 140 (48%) out of 290 defendants appeared in court as the detainees; In the following reporting period - 218 (54%) out of 402 defendants; In the subsequent reporting period - 452 (68%) out of 668; During the reporting period from March 2019 through February 2020 - 518 (76%) out of 686 defendants.

- On the positive side, the court[7] found the arrest in 4 cases unlawful, while in the previous reporting period, no such cases were reported.

- During the reporting period, the GYLA's monitors attended 444 preliminary court trials against 539 defendants. The prosecution presented the evidence of the prosecution at all hearings where necessary and asked to be declared admissible.

- At the 118 (26%) court hearings, the defense lawyer requested to declare the evidence he or she presented admissible, which is 8 percent lower than in the previous reporting period. This might have been caused by the difficulty in obtaining evidence due to the Covid-19 pandemic.

Plea agreements

- The plea agreement is usually concluded at the very first court hearing. In 188 cases (68%) out of 278 plea hearings, the plea agreement was approved at the first court hearing, and in the remaining 32% of the cases - at later stages of the proceedings.

- The court almost always approves the plea agreement reached between the parties. In the reporting period, only 1 case was identified where the judge refused to approve the prosecutor's motion for the plea.

- Among the plea agreements reached in this reporting period, plea agreements were most frequently concluded for property crimes in 89 (32%) cases, 67 (24%) for narcotic drug-related offenses, and 20 (7%) for transport crimes.

- The court monitoring has revealed that plea agreements are mostly signed for less serious and serious crimes. The rate of plea agreements for particularly serious crimes was only 6%.

- Just like the previous reporting periods, plea agreement court hearings were short. 60% of the trials ended within up to 15 minutes. There were 15 cases where the duration of the plea agreement trial did not exceed 5 minutes, and in 5 cases, it took the court to finalize the hearing in just 1 minute.

- As a result of the plea agreement, the accused persons are mostly sentenced

7 During this reporting period, all four cases of unlawful detention were identified in the Rustavi City Court.

to a suspended sentence (25%), a suspended sentence and a fine (20%) or a fine (15%); in rare cases (5%) - community service is imposed.

Hearings on the merits:

- Delaying of criminal court hearings is a significant challenge facing the court, which is due to the delayed commencement or postponement of court proceedings.

- The GYLA's monitors attended 993 main court hearings, of which 412 (42%) were **adjourned**. The postponement of court trials was mainly caused by the failure of the prosecutor to present witnesses (21%) or negotiating a plea agreement (19%). Among the reasons for postponing the court hearings during the reporting period was also the failure of the penitentiary institution to involve the accused in the remote court hearing.

- Delayed opening of trials was mostly (27%) the fault of the penitentiary facilities that failed to ensure the timely involvement of defendants in virtual court hearings.

- The court hearings were delayed **by 1 hour and/or more** in 176 (37%) cases, which is quite a high rate.

- Compared to the previous year, the number of acquittals has increased by 5 percent. GYLA attended the hearings on the merits of 161 persons, which ended in a court verdict. In **130 (80%)** cases, the guilty verdicts were delivered, **27 (17%)** were acquittals, **3 (2%)** partial acquittals, and in **1 (1%)** case**,** the judge changed the qualification of the crime.

- Based on the results of the consideration on merits, the court mainly sentenced the accused to suspended sentences (32% of cases), and 25% of the convicts were sent to prison. House arrest as a punishment (2%) was also observed during the reporting period.

Domestic crimes

- In the current reporting period, domestic violence cases have become even more alarming in the light of the existing constraints, since victims have to spend more time at home with abusers.

- The exercise of the right by victims of domestic crimes to refrain from testifying still remains a problem.

- In this reporting period, a total of 27 acquittals have been delivered, of which 11 (41%) were related to domestic violence offences, where the victims refrained from giving a testimony against a close relative due to which the defendants were ultimately acquitted.

JUDICIAL SYSTEM DURING THE COVID-19 PANDEMIC

INTRODUCTION

On March 11, 2020, the World Health Organization declared the novel Coronavirus (COVID-19) a pandemic. The number of people infected and killed by the virus started to gradually rise in different countries. This affected all spheres of human life, as well as the work of the state systems, and, among other things, had a significant impact on the administration of justice, which was largely manifested in the transition to virtual court proceedings. Initially, the Presidential Decree of March 21, 2020, provided for the possibility of holding court hearings remotely,[8] following which several temporary rules for carrying out court sessions were added to the law,[9] on the basis of which it became possible to conduct hearings remotely using electronic means of communication.

THE IMPACT OF THE PANDEMIC ON THE RIGHT TO A PUBLIC TRIAL

The publicity of the court hearing means the public conduct of the court session, the accessibility of the public hearing for the interested persons, the opportunity to be informed about the hearing and to attend it physically. The publicity of the case proceeding is guaranteed by the Constitution[10] and legislation of Georgia,[11] as well as by international instruments.[12] The judicial system should strive for greater transparency and openness, which serves as the solid ground for building public confidence in the judiciary.

8 Decree №1 of the President of Georgia "On the measures to be taken in connection with the declaration of the state of emergency on the entire territory of Georgia," March 21, 2020, Tbilisi.

9 Law of Georgia №5973 issued on May 22, 2020, available at: https://matsne.gov.ge/ka/document/view/4876514#DOCUMENT:1; The Law of Georgia №6779 issued on July 14, 2020, available at: https://matsne.gov.ge/ka/document/view/4924554#DOCUMENT:1; The Law of Georgia №38 of December 29, 2020, available at: https://matsne.gov.ge/ka/document/view/5063582#DOCUMENT:1.

10 Constitution of Georgia, Article 62 (3). [Last viewed: 20.06.2021].

11 Criminal Procedure Code, Article 10 (1).

12 Universal Declaration of Human Rights, Articles 10, 11 (1); International Covenant on Civil and Political Rights, Article 14 (1); Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 (1).

The pandemic situation created by the spread of COVID-19 posed serious challenges to the courts, including how to protect the principle of publicity in legal proceedings. The judiciary demonstrated non-homogeneous approaches throughout the pandemic year, depending on the spread of the pandemic in the country. In certain cases, when the number of infected people decreased, the court tried to hold hearings in the courtroom, and if the number of Covid-19 cases sharply increased, the court would mostly resort to virtual hearings.

RESTRICTING THE ACCESS OF GYLA MONITORS AND STAKEHOLDERS TO PUBLIC HEARINGS

Once it was stipulated in the Presidential Decree[13] the possibility of holding court hearings remotely as per the Criminal Procedure Code of Georgia using electronic means of communication, the court, in the first stage, was literally closed for stakeholders, including for the non-governmental organizations. Thus, observing the trials in the courtroom became impossible. Another problem was the inability of the court to provide access to virtual trials, ultimately failing to conduct trials openly, publicly, and transparently.

On April 2, 2020, GYLA filed an application with the High Council of Justice seeking permission to attend remote court proceedings.[14] The Council replied that due to the current situation, despite adhering to the principle of publicity, the judicial system lacked the ability to allow GYLA monitors to participate in virtual court hearings.

It was in early May 2020 when GYLA began monitoring court trials remotely, yet in the Tbilisi City Court only. The other courts denied us access to remote hearings on the grounds that the participation of the organization's observers would lead to technical delays due to a large number of attendees.[15]

Upon the request, on June 2, 2020, the Zugdidi District Court provided access for the GYLA monitors to all stages of remote court proceedings. Consequently, the argument of other courts regarding the involvement of GYLA's observers and the

13 Decree №1 of the President of Georgia "On the measures to be taken in connection with the declaration of the state of emergency on the entire territory of Georgia," March 21, 2020, Tbilisi. [Last viewed: 05.07.2021].

14 02/04/2020, Statement №ჹ-01/37-20.

15 The reply of Kutaisi City Court, 11.05.2020, application №4212-2. The reply of Batumi City Court, 11.05.2020, application №313-ჹ/ჯ. The reply of Rustavi City Court, 06.05.2020, application №440 / ჹ.

limitation of the principle of publicity remained unclear. In doing so and by referring to the likelihood of some abstract technical problems, the courts placed the defendants involved in court trials in an unequal position in terms of the publicity of the hearings, depending on the jurisdiction their cases were deliberated in.

From June 1, 2020 through March 2021, GYLA monitored criminal cases in a mixed manner (remotely and/or physically observing hearings in the courtroom) in 6 courts.[16]

During this period, the courts mostly allowed the GYLA's monitors to attend remotely and/or physically the trials in the courtroom. However, some delays still occurred. For example, the monitors were sometimes not provided with the links required to attend the remote sessions, or the GYLA's observers were disconnected from the virtual hearings for some technical and software failure reasons. As regard court hearings in the courtroom, the recommendations[17] issued by the High Council of Justice concerning eligible attendees proved to be risky as judges made arbitrary decisions. Some judges unreasonably restricted individuals to attend court hearings, and several others disallowed the GYLA to monitor the hearing under the pretext of preventing the risk of the pandemic spread[18] and by citing the decision of the Council.[19] GYLA offered the judges an alternative way to remotely involve the monitor to observe the hearing, yet the court did not provide the virtual access either. These cases created the impression that specific judges took advantage of the situation and avoided the involvement of unbiased observers in the process.

16 During the reporting period, GYLA monitored cases in the Tbilisi, Kutaisi, Batumi and Rustavi City Courts both remotely and in the courtroom; In Zugdidi District Court - remotely, and in Telavi District Court - GYLA monitor observed real court proceedings in the court building remotely, partially remotely or in the courtroom.

17 Recommendations issued by the High Council of Justice "On measures to be taken in the judicial system to prevent the possible spread of Coronavirus," 13/03/2020, available at: http://hcoj.gov.ge/Uploads/2021/2/01-2020.pdf; "On measures to be taken in the judicial system to prevent the spread of New Coronavirus (COVID-19)," 05/06/2020, available at: http://hcoj.gov.ge/Uploads/2021/2/02-2020.pdf; "On measures to be taken in the judicial system to prevent the possible spread of Coronavirus," 15/09/2020, available at: http://hcoj.gov.ge/Uploads/2021/2/03-2020.pdf; "On measures to be taken in the judicial system to prevent the possible spread of Coronavirus," 01/12/2021, available at: http://hcoj.gov.ge/Uploads/2021/2/04-2020.pdf. [Last viewed: 18.07.2021].

18 While the GYLA monitors always strictly adhered to the relevant rules and regulations related to the pandemic.

19 In the reporting period, GYLA monitored cases in the Tbilisi, Kutaisi, Batumi and Rustavi City Courts both remotely and in the courtroom; In Zugdidi District Court - remotely, and in Telavi District Court - GYLA monitor observed real court proceedings in the court building remotely, partially remotely or in the courtroom.

AVAILABILITY OF COURT HEARINGS

The pandemic has confirmed the importance of publishing information on court hearings not only on the boards in the courthouse but also on the official websites of the courts.[20] Non-publication of the first appearance court hearings remains a problem. Of the 396 first appearance court hearings attended by the GYLA monitors, information on 282 (71%) trials and more than half (51%[21]) of the plea hearings was not made public. The situation is relatively better with preliminary trials and merits hearings, where information about the trials was not published - in 6%[22] and 12%[23] of the cases, respectively.

The pandemic has also limited the practical ability of all interested individuals to attend case proceedings. In 476 (48%) out of the 993 main hearings, not every stakeholder was able to be present at the sessions. This was due to the following two key factors: the limited attendance opportunities for citizens due to the threat posed by the Coronavirus to the case proceedings in the courtroom (in these cases, for the most part, only observers and sometimes journalists were allowed to attend the hearings apart from the participants to the proceedings) and remote trials by electronic means where no one other than the participants to a case proceeding and monitors was permitted to attend.

It is important to focus not only on observer organizations and journalists but also on ordinary citizens who may have an interest in any ongoing court hearing. The court should strive to hold as many public hearings as possible in light of the pandemic.

It is worth mentioning the cases where the judge allowed the family members of the accused to attend the hearing in the courtroom.

EXAMINATION OF EVIDENCE AT REMOTE COURT HEARINGS

Witness interrogation procedure

As per the principle of equality of arms and adversarial proceedings, special im-

20 As the GYLA's monitors selected specific court hearings that they wished to observe on the basis of the published information and only after that addressed to the panel of a particular judge for permission to access to trials physically or remotely.

21 Of the 278 plea agreement court hearings, information was not made public on 141 trials.

22 Of the 444 preliminary court hearings, information was not published about 26 hearings.

23 Out of 993 merits court deliberations - information was not published about 122 trials.

portance is attached to the examination of evidence in court. The principle of direct and oral examination of evidence is guaranteed by law.[24] The direct analysis of the evidence presented by the parties before the court gives the court an opportunity to more clearly understand the circumstances of the case. Besides, during the court proceeding, the direct examination helps to establish the court's internal belief in relation to any specific evidence and the validity of the charge against the accused.[25]

Due to the pandemic, most of the court hearings were conducted remotely, using electronic means, which also meant **interviewing witnesses** remotely. The monitoring revealed that witnesses were questioned in 331 trials, of which 180 (54%) were virtual hearings[26] during which the witnesses were interviewed remotely. The witnesses would join the hearings from their homes, or other rooms in the court,[27] police stations, while the arrested or detained individuals from penitentiary facilities, etc. The interrogation of witnesses in a hybrid manner raised a number of questions: whether the witnesses were alone in the room from which they were being questioned; whether the pressure was exerted on them by any party in order to obtain the desired testimony; or whether the place from which the person was joining the session was pressurizing in itself preventing the witness from providing the court with impartial and comprehensive information around the case; whether the witnesses were reading out the testimonies prepared in advance, etc.

Several cases were identified where officers of investigative bodies joined the court hearing from the police station, which raised doubts that the persons questioned into one case were listening to each other's testimonies or reading out pre-written testimonies. At one of the court sessions, the judge made a remark several times to the witnesses of law enforcement agencies as follows **"don't look at the table, look at the screen. I have the impression that you are reading something in there."**

There were cases where defense witnesses were joining the remote hearing from the lawyer's office. For the illustration, please see the following example:

> A witness invited by the defense lawyer was participating in the trial from the lawyer's office sharing the same technical equipment. In this respect, the judge heard the prosecutor's position "we do not interview witnesses

24 Criminal Code of Georgia, Article 14.

25 Commentary on the Criminal Procedure Code of Georgia, et.al authors, Editor: Giorgi Giorgadze, Tbilisi, 2015, p. 117.

26 Here is meant a trial where at least one of the participants to the criminal proceeding was participating remotely.

27 This was mostly practiced by the Rustavi City Court.

from our offices since there is a risk of influencing on or dictating to a witness. Accordingly, the defense should be so kind and interview the witness from another place." After that, the defense witness simply used his or her own e-mail and technical equipment, a mobile phone, yet he or she did not leave the lawyer's office. The prosecutor called on the judge to warn the lawyer to refrain from dictating the answers that were quite clearly and unequivocally audible.

In such cases, the court should take appropriate measures, suspend the interview, adjourn the hearing or continue the interrogation of the witness only when the witness is able to provide information freely without the lawyer's prompts and interference.

In several cases, other individuals were present in the room along with the witnesses participating in the trial remotely. For the illustration, please see the following example:

In one of the cases where the person was charged with threatening (an act under Article 151 of CC), it was found out during the trial that the accused was at home together with the victim and they were joining the trial from the same room sharing the same mobile phone. The victim was supposed to be questioned during the trial as well. The victim refused to arrive at the police unit. Apparently, he or she was not able to show up in the court because of the pandemic-related restrictions. Having learned about this, the judge refused to interview the victim in the given conditions arguing that in those circumstances the whole interrogation process would be compromised since there was no guarantee that the witness (victim) would not be influenced.

It is important that the court, when interviewing a witness remotely, should thoroughly check the whereabouts of the witness as far as possible, to find out whether other individuals are near the witness, and whether the witness genuinely feels free from any influences on the part of other persons.

For the most part, judges of the Zugdidi Court were distinguished by the best approach to the matter. The judges of the Zugdidi Court in the majority of the cases tried to check the witnesses joining the trials virtually to make sure they felt free to give impartial and objective statements.

For the illustration, please see the following example:

Prior to questioning the witnesses, the judge asked each of them to rotate the camera 360 degrees in the room, in this manner the judge checked

to see if another person was present along with the witness. The judge then asked the witnesses to be seated in front of the door to ensure that no one could enter the room. The judge also asked all of the potential interviewees to bring their ID cards closer to the camera to verify their identities.

On the positive side, one of the judges of the Zugdidi District Court introduced the so-called internal regulations for remote court hearings, which the secretary would forward in advance to the parties and witnesses to let them know beforehand what technical procedures they would have to go through at the hearing. According to the internal regulations, any individuals present at the remote trial must have their status shown, for example, the prosecutor, a visitor, etc.

It is noteworthy that there are a number of shortcomings in terms of virtual trials, and the approaches of the judiciary to specific issues are diverse, which places defendants in unequal conditions. Therefore, it is important to provide at least some provisions at the legislative level relating to the conduct of remote court hearings and/or to introduce guidelines, instructions to ensure that judges have a uniform approach. With respect to the interrogation of the witness, it should be defined how to conduct the interview procedure in such a way as to minimize the risks of impact on the witness. Prior to questioning the witness, the judge should take steps to minimize any influence on the witness during the testimony. For example, in the room where the witness is interviewed, the camera should be placed in such a manner so as to cover the entire room in order to exclude the presence of any other individuals in the room or influence on the witness, etc.

There were cases when the parties did not deem the prospect of remote interrogation of witnesses effective and petitioned to interview the witnesses in the courtroom, which the court in the majority of cases supported.

EXAMINATION OF MATERIAL EVIDENCE

The practice confirms that it is difficult to examine material evidence at a virtual court hearing, due to the specifics of the content of the physical evidence itself. Material evidence can be an item, document, substance, or any other object, which, by its origin, place, and time of discovery, characteristics and traces remaining on it is related to the factual circumstances of a criminal case and may be used to detect a crime, establish a culprit, deny or confirm charges, as well as pre-marked and/or counterfeit (imitation) item, document, substance, or any other object used during the controlled delivery as provided in Article 7(21) of the Law of Georgia on Operative-Investigative Activities.[28] As far as the examina-

28 Criminal Procedure Code of Georgia, Article 3(25).

tion of material evidence means opening the sealed item of evidence directly in the courtroom, checking the relevant seal numbers, inspecting the item, deciphering the traces on it and relevant individual characteristics, this is practically impossible in a hybrid court trial.

The monitoring revealed 20 court hearings at which material evidence was examined, of which in **6** (30%) cases the physical evidence presented by the prosecution was examined at a remote court trial.[29] In the remaining cases, the defense lawyer requested to have the evidence examined in the courtroom.

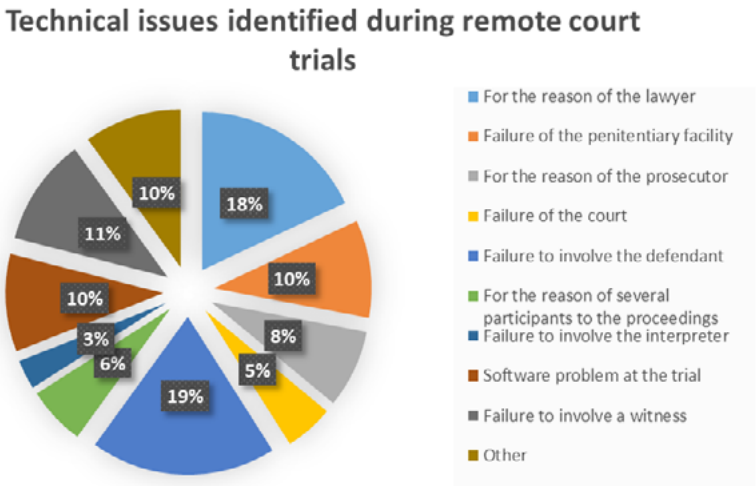
TECHNICAL ISSUES

In the given reporting period, the technical problems that arose during the consideration of cases were largely related to remote hearings. In particular, technical shortcomings were observed in 15 cases during the preventive measure hearings, of which 11 (73%) were remote hearings, and in the case of preliminary trials – at 42 (98%) out of 43 hearings. The number of technical issues identified at plea court hearings was relatively low. A total of 6 such cases were identified but in all cases, the problem occurred during the virtual trial. Of the 92 merits trials where technical problems did occur, 87 (94%) were remote sessions.

Technical problems were observed in a total of 156 cases, of which 146 (94%) were remote hearings.[30]

The chart below shows the results of GYLA's court monitoring in terms of technical issues identified during the remote court hearings between March 2020 through March 2021.

Chart №1



29 Here is meant the cases where at least one of the parties is not present in the courtroom and is remotely involved in the case proceedings.

30 This data does not include the court hearings postponed due to technical issues.

The problems identified during virtual court trials were varied: some were caused by the participants to case proceedings, sometimes the audio was interrupted or the software failed,[31] the image would disappear, or some participants of the trial were disconnected due to the problems with the internet connection. Due to a technical failure, the GYLA's monitor also had to leave the hearings on several occasions.

The technical shortcomings related to remote hearings in penitentiary institutions are caused not only by software issues but also by the lack of staff with relevant knowledge.

For the illustration, please see the following example:

> There was a technical issue in the detention facility, the accused could hardly hear the voices, so a break was announced and the accused was transferred to another room. Yet, the sound in the room was no better either. After changing the room again, the problem in the new location was eliminated. The judge remarked that in recent days the pre-trial facility had a systematic problem, so the court was not able to communicate properly with the accused and was forced to conduct the trial in such conditions. The judge noted that the problem was resolved that day thanks to an employee of the facility who was well-versed in technical matters, while in other cases, the facility failed to take appropriate measures, and the trials were held with flaws and/or in poor audio conditions.

The monitoring clearly shows that penitentiary facilities do not have sufficient human resources with relevant literacy to ensure the smooth participation of defendants in virtual court hearings.

GYLA applied to the Special Penitentiary Service of the Ministry of Justice of Georgia requesting information on remote involvement of accused/convicted persons in court hearings,[32] in particular, how many penitentiary institutions ensured the remote participation of accused/convicted persons in court hearings, the number of computers each penitentiary facility owns for virtual hearings, as well as the number of appropriately trained staff and specially equipped rooms from March 2020 to May 15, 2021; also, whether the quality of the internet in the penitentiary institutions and the relevant technical equipment was improved as of the period from March 2020 to May 15, 2021, etc. **The Special Penitentiary Service did not provide us with the information.**

31 The trials were conducted remotely using the software Cisco Webex.

32 Georgian Young Lawyers' Association, 17/05/2021, Application № გ-04 / 110-21.

THE RIGHT TO DEFENSE, CONFIDENTIALITY OF COMMUNICATION BETWEEN THE LAWYER AND THE ACCUSED

Introduction

The right to legal protection is the cornerstone of a fair trial. For the most part, the accused lacks the ability to properly and effectively defend himself against a criminal charge without the assistance of a qualified lawyer. The defense lawyer must not be limited in communication with his or her client so that he can act in the interests of the accused, reconcile positions with him, propose a defense strategy, and ultimately carry out a comprehensive defense scheme. This, however, is impossible without proper communication between the lawyer and the accused. Communication of the accused with his or her lawyer must be confidential and free. The communication of an arrested defendant or convict with his or her lawyer can be restricted by means of visual surveillance, and the law provides no other exceptions in this respect.[33] The lawyer shall be obliged to protect the confidential information so that it is not accessible to any third parties.[34]

Identified results

The monitoring has revealed that in the majority of cases the interests of the accused persons in the court are defended by their lawyers.

At preventive measure hearings, 74% of the defendants[35]were represented by a lawyer, and **83%**[36] at the **preliminary court hearing**. Due to the mandatory requirement of the lawyer's participation in the plea agreement hearing, all defendants had lawyers at all trials and **92%** of the defendants[37] at the **merits hearings** were represented by a lawyer.

For the most part, defendants were represented by contracted (private attorneys) legal counsel, although the observations show that the situation is different in the plea agreement cases, where the interests of defendants are frequently protected by state-appointed defense attorneys.

33 Criminal Procedure Code, Article 43 (1,3).

34 Code of Professional Ethics for Lawyers, Article 4 (1).

35 At 396 court hearings determining the restraining measures, 344 of the 464 accused were represented by defense attorneys.

36 At 444 preliminary court hearings, 450 out of 539 defendants were represented by defense lawyers.

37 Out of 993 hearings on the merits against 1339 accused, 1228 defendants were represented by defense lawyers.

Table № 1

Lawyers	State-appointed lawyers	Private lawyers	Not identified
Restrictive measure court hearings	27%	57%	16%
Preliminary court hearings	27%	62%	11%
Plea agreement court hearings	43%	25%	32%
Merits hearings	28%	67%	5%

It was found that on average, the defense lawyer communicated and coordinated his steps effectively with the defendant in 53%[38] out of 2574 cases. In other cases, the observer could not find out how adequate the communication was or whether any inappropriate patterns of communication occurred.[39]

In the reporting period, the communication between the lawyer and the defendant became more complicated due to the pandemic and the shift to virtual court proceedings. There were cases when the defense lawyer was unable to communicate adequately with the accused because the hearing was held remotely and the sound quality was poor.

For the illustration, please see the following example:

> At one of the plea agreement hearings, the accused joined the session remotely. As he could not understand specific questions due to his elderly age, the judge had to repeat the same thing several times. The defense lawyer was also trying to establish effective communication with his or her

38 Effective communication between the lawyer and the accused was identified in the restraining measure hearings – in 51% of cases, in the preliminary court hearings - in 53% of cases, in the plea agreement hearings - in 63% of cases, in the hearing on merits- in 44% of cases.

39 This includes cases where the observer was not able to identify how effective the communication between the accused and the lawyer was, for example, the hearing was soon postponed and/or the defense lawyer did not take any steps (e.g. the trial focused only on the prosecution's speech) to assess and analyze information concerning the communication between the defendant and the lawyer and other such cases.

client and provide the accused with the consultation, which raised some concerns regarding the confidentiality of the communication between the lawyer and the client.

The confidentiality of communication between the accused and the lawyer was at risk during virtual court proceedings. In several cases, the advice the defense lawyer was providing to the defendant in the remote trial was available to third parties.

In contrast, there were cases where the judge took specific steps to protect the confidentiality between the lawyer and the accused.

For the illustration, please see the following example:

Before making the closing remarks, the defense lawyer requested some time to talk with the accused in order to agree on a position regarding the sentence. The trial was partially remote, with the accused present in the courtroom and the lawyer joining remotely. The judge announced a break and asked those attending the trial to temporarily leave the platform so that the conversation between the accused and the lawyer could be kept confidential. A few minutes later, the hearing was resumed.

GYLA believes that the court should take relevant steps to guarantee that communication between the accused and the lawyer during virtual court hearings is not disclosed and to ensure that third parties cannot access confidential information. For this purpose, the judge must temporarily suspend the hearing, disconnect the relevant technical means and/or give the accused and his or her lawyer time to communicate in person.

NEW PROVISIONS APPEARED IN THE CRIMINAL LAW DUE TO THE PANDEMIC

During the first wave of the Covid-19 pandemic in the country, the government decided to add new provisions to the Criminal Code. However, at the first stage, the President of Georgia issued the decree №1 on March 21, 2020, envisaging criminal liability for a repeated violation of the state of emergency,[40] for which the decree stipulated imprisonment for up to three years.

According to the Criminal Code, an act shall be considered a crime only if it is provided for in the Code. One of the main characteristics of a crime is that if the liability is removed or mitigated, it gets the retroactive effect in relation to the act already committed. Because of this feature, its inclusion in a temporary act is unjustifiable, because, in the event of its cancellation, it acquires the retroactive force and the liability is removed. That is why prosecution under the Presidential Decree turned out to be problematic due to the validity of these norms in time.[41]

There was also the problem of proportionality of the punishment in relation to the criminal liability defined by the Presidential Decree. The decree provided the same type of sentences for any form of violation of the state of emergency, regardless of whether or not it resulted in any consequences. Violations were not categorized according to their potential ability to pose little or no threat, or those which, on the contrary, could inflict dangerous or harmful damage. Thus, it was necessary to differentiate crimes and determine corresponding punishments.[42]

Consequently, on April 23, 2020, the Criminal Code was amended. According to the initiators of the bill, due to the unprecedented situation in the world as a result of COVID-19 and the situation in Georgia, as well as in order to avoid any anticipated risks in other possible epidemics/pandemic scenarios, it was required to create an effective mechanism at the legislative level that would prevent the spread of Coronavirus and other similar threats, and ensure the health and life of

40 It was established that the violation of the state of emergency would result in a fine of GEL 3,000 for a natural person, GEL 15,000 for a legal person, and in criminal liability in case of the repetition of a similar act.

41 GYLA's report "Sovereign -"Prime Minister"(2021), pp. 80-82, available at: https://bit.ly/3iaolBs. [Last viewed: 20.07.2021].

42 Ibid p.83.

individuals living in Georgia.[43]

In the conditions where a part of the individuals on the territory of Georgia was/is placed in the so-called self-isolation or quarantine, and in certain cases, these individuals violated the self-isolation and quarantine rules posing a significant risk to the lives and health of others, the government decided to introduce legislative changes to the Georgian Code of Administrative Offenses, the law of Georgia "On public health," and the Criminal Code of Georgia.

Two completely new articles have been added to the Criminal Code, Article 248^1 of CC - violation of the rule of isolation and/or quarantine, and Article 359^1 of CC - violation of the state of emergency or martial law. The amendments became effective on May 02, 2020.

Criminal liability was determined:

- For a violation of the isolation and/or quarantine regulations established in connection with the matters determined by the Law of Georgia on Public Health, committed by a person who has already been administratively punished and/or convicted for a crime provided for in Article 42^{10} of the Code of Administrative Offenses of Georgia. The punishment envisages house arrest for a term of 6 months to 2 years, or imprisonment for a term of up to 3 years.[44]

- Also, for a violation of the state of emergency or martial law defined by the Decree of the President of Georgia and/or other relevant normative acts (including for violation of isolation and/or violation of quarantine rules in connection to the matters regulated in accordance with the Law of Georgia on Public Health if these rules constitute a part of the state of emergency or martial law), committed by a person punished administratively and/or convicted for a crime envisaged under this Article. The punishment is imprisonment for up to 6 years unless otherwise provided by the Decree of the President of Georgia.[45]

The draft law was reviewed and adopted in an expedited manner, and the reasoning behind it was based on the fact that the legislative amendment was caused by the urgency taking place both in the world and in Georgia, and served to timely prevent relevant threats.

43 The explanatory note to the draft law of Georgia on Amendments to the Criminal Code of Georgia, available at: https://bit.ly/3ytgVj5 [last viewed: 20.07.2021].

44 Criminal Code, Article 248^1.

45 Criminal Code, Article 359^1.

GYLA considered the changes to be defective. The organization negatively assessed the closure of the process of adopting the legislative amendments, without the involvement of stakeholders, and deemed that a part of the legislative changes was vague and another part was failing to meet the human rights standards recognized and strengthened by the Constitution of Georgia.[46]

According to the OSCE Recommendation, in the event of a state of emergency or any similar scenarios, penalties for the purpose of protecting public health should be imposed only if they are strictly a necessity, they must be constantly revised and as soon as the emergency is over, these measures and related penalties should be lifted. Emergency-related penalties should not disproportionately restrict human rights and fundamental freedoms.[47]

On June 23, 2021, the Government of Georgia presented a bill on amnesty to the Parliament,[48] according to which a person who committed a criminal offense under Article 248[1] (a violation of isolation and/or quarantine) or Article 359[1] (a violation of the state of emergency and martial law) shall be released from criminal liability. The amnesty shall apply to the enforcement of relevant penalties as well. As for the circle of individuals, according to the draft law, the amnesty shall apply to those persons who committed the above offenses prior to June 23, 2021.

According to the data available, the investigation has been launched into 227 cases of violations under Article 359[1] of the Criminal Code of Georgia, and 1486 cases into crimes under Article 248[1] of the Criminal Code of Georgia.

REQUESTED INFORMATION

With the view to finding out what the criminal policy of the pandemic management was, how the legislative amendments were enforced in practice and whether there was a necessity for the state to introduce criminal norms, as well as the types of punishments imposed for these crimes, GYLA analyzed several cases identified through the court monitoring, requested relevant information from the Ministry of Internal Affairs of Georgia, the General Prosecutor's Office of Georgia, and the common courts.

46 "GYLA's assessment on the legislative amendments in connection with the state of emergency," available at: https://bit.ly/3zedVbv [last viewed: 22.07.2021].

47 OSCE / ODIHR - Fair Trial Rights and Public Health Emergencies, 2021, P.13 Available at: https://bit.ly/3cuaMuk [last viewed: 22.07.2021].

48 Draft Law of Georgia on Amnesty (Date of Initiation: 23/07/2021), available at: https://bit.ly/3rwU0kD.

In particular, GYLA requested the following information from the Ministry of Internal Affairs of Georgia[49] and the General Prosecutor's Office of Georgia:[50] the number of investigations launched and the number of individuals prosecuted for crimes under Article 248[1] of the Criminal Code of Georgia and Article 359[1] of the Criminal Code of Georgia (separate data) from May 2, 2020 through February 28, 2021.

Table №2

Statistical data of the Information-Analytical Department of the Ministry of Internal Affairs and the General Prosecutor's Office of Georgia (As of 02.05.2020-28.02.2021)		
Article of the CC	**Initiated investigations**	**Initiated criminal prosecution**
Article 248[1] of the CC "Violation of the isolation/ and quarantine rules"	**562**	**28**
Article 359[1] of the CC "Violation of the state of emergency or martial law"	**135**	**None**

According to the information provided,[51] the rate of the investigation initiation is high, although the criminal prosecution is barely launched. The statistical information received shows that in the period from May 2, 2020 through February 28, 2021, no one was prosecuted under Article 359[1] of the Criminal Code.

GYLA requested the following information and court judgments from the six courts the organization monitors (Tbilisi, Kutaisi, Batumi, Rustavi City Courts, and Zugdidi and Telavi District Courts[52]):

- In the period from May 2, 2020 through February 28, 2021, the number of cases each court considered in connection with the crimes under Article 248[1] of the Criminal Code of Georgia and Article 359[1] of the Criminal Code of Georgia (separate data).

49 Application №-04 / 112-21 of the Georgian Young Lawyers' Association 17/05/2021.

50 Application №-04 / 111-21 of the Georgian Young Lawyers Association 17/05/2021.

51 The reply of the Ministry of Internal Affairs of Georgia, 07/06/2021, application MIA 92101436115; the reply of the General Prosecutor's Office of Georgia, 25/05/2021, application №13 / 30317.

52 Applications of the Georgian Young Lawyers' Association 17/05/2021, №-04 / 106-21, №-04/108-21, №-04 / 105-21, №-04 / 104-21, №-04 / 109-21.

- Of the above, the number of cases resolved with a plea agreement and the number of cases finalized through the merits hearing.

- The number of acquittals, guilty or partially guilty verdicts.

GYLA also requested court judgments delivered by the six courts in the period from May 2, 2020 through February 28, 2021 in connection with the crimes under Article 248[1] of the Criminal Code of Georgia and Article 359[1] of the Criminal Code of Georgia (separate data) as well as offenses in combination with these articles (both finalized with plea agreements and as a result of main hearings).

Based on the information provided by the courts, the Rustavi City Court[53] - did not deliberate such cases, the Batumi City Court[54] - considered **2 cases** against two individuals under Article 248[1] of the Criminal Code of Georgia and resolved both cases by concluding the plea agreement (a guilty verdict). The Zugdidi District Court[55] adjudicated **6 cases** under Article 248[1] of the Criminal Code, all of them were deliberated at the merits hearings and finalized with a guilty verdict. The Kutaisi City Court[56] - considered **17 cases** under Article 248[1] of the Criminal Code, most of which ended in plea agreements. The Telavi District Court[57] did not hear any cases under the above articles, and the Tbilisi City Court did not provide the information we requested[58] on the grounds that the data are not registered/ processed by the court.

During this reporting period, the courts did not hear any cases under Article 359[1] of the Criminal Code.

THE ANALYSIS OF COURT JUDGMENTS AND THE RESULTS OF COURT MONITORING, SENTENCES IMPOSED

In total, we received 25 verdicts delivered into the cases under Article 248[1] of the Criminal Code.[59] The analysis of the judgments showed that in most cases the verdict for the offenses was delivered without a main hearing of the case,

53 The reply of Rustavi City Court, 19/05/2021, application №607 / ჟ.

54 The reply of Batumi City Court, 25/05/2021, application №266 ჟ/ჯ.

55 The reply of Zugdidi District Court, 27/05/2021, application №348.

56 The reply of Kutaisi City Court, 27/05/2021, application №7279-ს.

57 The reply of Telavi District Court, 21/05/2021, application №284.

58 The reply of Tbilisi City Court, 24/05/2021, application №1-0489 / 14461.

59 **Six** court rulings from Zugdidi District Court, **17** judgments from Kutaisi City Court, **2** judgments from Batumi City Court.

through a plea agreement. In particular, 19 cases were resolved with the plea agreements, and 6 cases as a result of merits hearings.

In all cases **considered at the hearings on the merits,** the defendants pleaded guilty, cooperated with the investigation, and considered the evidence indisputable, which is why the sentences were not substantially different from those imposed under Article 248[1] of the Criminal Code finalized with a plea agreement. On the contrary, in most cases, the sentences imposed by the judge were more lenient than those specified in the plea agreement agreed with the Prosecutor's Office.

As a result of the merits hearings, in 5 cases, the judge sentenced the accused to 6 months imprisonment, which was considered as suspended for the same probation period, and in the remaining 1 case, house arrest for 1 year.

The analysis of the **verdicts concluded in plea agreements** shows that the accused individuals were sentenced to imprisonment for 1 year in 14 cases, which was considered as suspended for the same probation period, in one case to 1 year and 6 months imprisonment, which considered as suspended for the same probation period. In 2 cases, the defendants were sentenced to 100-100 hours of community service as a result of the plea agreement, and in two cases - a fine of GEL 3000-3000, respectively. In one case, the person was charged with theft under another article (theft and consumption of narcotic drugs without a doctor's prescription) and was therefore sentenced to 4 years in prison, of which 1 year to be spent in a penitentiary facility, 3 years was considered as suspended, and a fine in the amount of GEL 4,000.

The analyzed court rulings show that the circumstances of cases are not described in detail in the judgments, and if they are, the content is identical - "The person sentenced for the same administrative offence intentionally violated the rule of isolation and/or quarantine in connection with the matters provided for in the Law of Georgia on Public Health, i.e. prohibition of movement from 21:00 to 05:00am."

As part of the court monitoring, GYLA attended only single preventive measure, preliminary, plea agreement, and merits court hearings deliberating the cases under Article 248[1].

At a court hearing determining a measure of restraint, the prosecution demanded bail in the amount of GEL 3,000 against the person charged with Article 248[1] of the Criminal Code. According to the prosecutor, the accused had already been twice imposed administrative penalty for

violating the quarantine and isolation regulations. Nevertheless, he again committed the prohibited act. Consequently, the risk of committing a new crime was high. There was also a risk of absconding, as the indictment envisaged imprisonment as a form and measure of punishment. Besides, the accused did not have a permanent place of residence because he had left his home. The prosecutor also noted that the accused would influence the persons interviewed into the case. The defendant declared that his current income was subsistence he received from friends, and he periodically did some private errands to make ends meet. According to the accused, he had never been convicted, he was not going to abscond, which was confirmed by the fact that he showed up in court before the scheduled time. The defendant pointed out that he lived on the street and had left his family. The judge sentenced the defendant to bail in the amount of GEL 2000.

In this case, we believe that the court imposed a severe restrictive measure against the accused. The court should have paid more attention to the actual situation of the accused. The fact that the defendant did not have a permanent place of residence and lived on the street actually and automatically forced him to violate the so-called curfew because he had nowhere else to go. In such a situation, the payment of GEL 2000 bail for the accused was associated with great difficulty and, in fact, could not guarantee his proper behaviour.

The GYLA's monitor attended a **plea agreement hearing** where it was revealed that the accused had never been convicted. The factual circumstances of the case were not disclosed during the hearing. The prosecutor read out only the resolution part of the motion. According to the presented plea agreement, the defendant was sentenced to 1-year imprisonment, which was considered as suspended with the probation period of 1 year, the same sentence that was commonly used to resolve the cases under Article 248^1 through a plea agreement.

The analysis of the verdicts and the observation of the court show that lighter sentences are almost always imposed for other crimes as a result of the plea agreement than when considering the case on the merits, while with respect to Article 248^1, judges at the merits hearings are usually inclined to determine similar and/or milder sentences than those stipulated in the plea agreements.

THE FIRST APPEARANCE COURT HEARINGS

INTRODUCTION

The exercise of the right to a fair trial[60] begins with the first appearance of the accused before the court (hereinafter the first appearance court hearing). At this stage, the court finds out whether the accused was subjected to torture or inhuman treatment, informs the accused of his or her rights and obligations,[61] inquires whether the rights of the accused were violated at the stage of the investigation, explains the essence of the accusation to the defendant and informs him or her about the type and size of the sentence, inquires whether there is the possibility of concluding a plea agreement and, with the consent of the parties, delivers a relevant decision.[62]

The first appearance court hearing discusses a measure of restraint[63] to be selected[64] in order to ensure the proper conduct of the accused, and analyses whether it is reasonable to release the accused on parole or whether there is the urgency to send the accused to jail.

Conducting the first appearance court hearings virtually increased the risk that the facts of torture or other inhumane treatment could remain undisclosed. If prior to the pandemic, defendants had been provided with the opportunity to speak in the courtroom, which is a much more secure space for the accused rather than an administrative unit of the police, or to claim about alleged violence they had been subjected to, during the remote proceedings they had to testify while in police administrative buildings or temporary detention facilities. This, in turn, naturally increased the risks that the defendants would not be as open as they usually are in the courtroom.

In terms of selecting the measure of restraint, the accused and the defense lawyer should communicate in advance and reconcile their positions. As per the restrictions dictated by the pandemic, the lawyers were unable to meet with the arrested defendants before the court trials and most of the defendants were

60 Constitution of Georgia, Article 31; Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6.

61 Criminal Procedure Code of Georgia, Article 38.

62 Criminal Procedure Code of Georgia, Article 197.

63 Criminal Procedure Code of Georgia, Article 199.

64 Criminal Code, Article 197.

joining the court hearings remotely incapable of having the opportunity to communicate in person with their lawyers. The communication through electronic means threatened the confidentiality of the communication between the lawyer and the client as the platform fully recorded the ongoing communication during the hearing.

Defendants not represented by a lawyer rarely substantiated their opinions regarding the application of a measure of restraint. We think this can be related to their illiteracy in legal terminology and lack of confidence. In virtual court hearings, such defendants would become even less reluctant to speak, mainly due to the hearings involving technical issues. Often the voice of the accused was not heard well, which additionally prevented them from speaking and made them more focused on ending the hearing as soon as possible.

It is also important to note that often[65] in the courtroom defendants who do not have a good command of the language of the case proceedings need the interpreter to repeat the translation several times, and during the virtual court hearings, when the interpreter was joining from another place, it was even more difficult for the defendants to comprehend the translation.

The remote holding of the first appearance court hearings also affected the quality of substantiation of the requested restraining measures. As we have mentioned, arrested defendants often had trouble communicating with their lawyers, and the pandemic-related constraints further complicated the process of obtaining evidence in support of the defense at the very first hearing.

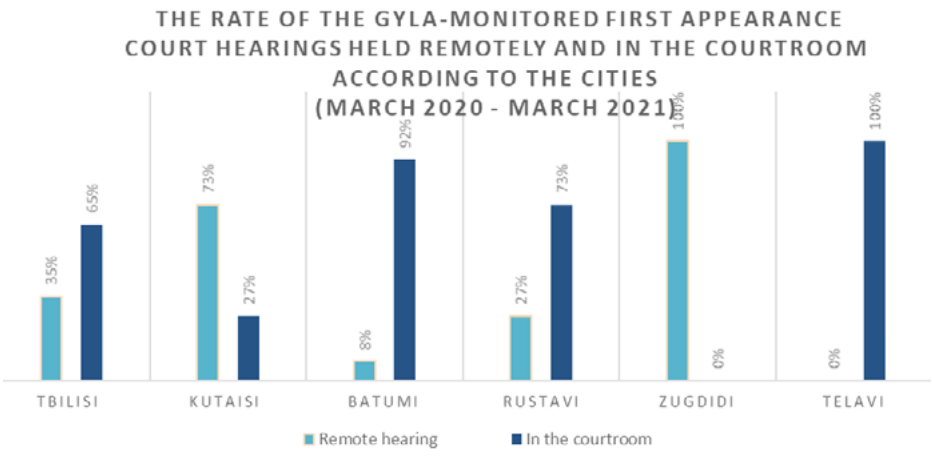
Analysis of the first appearance court hearings

During the reporting period, the GYLA monitors attended 396 first court hearings with the participation of 464 accused.

The following chart shows the rate of first appearance hearings held remotely and in the courtroom according to the cities (from March 2020 through March 2021).

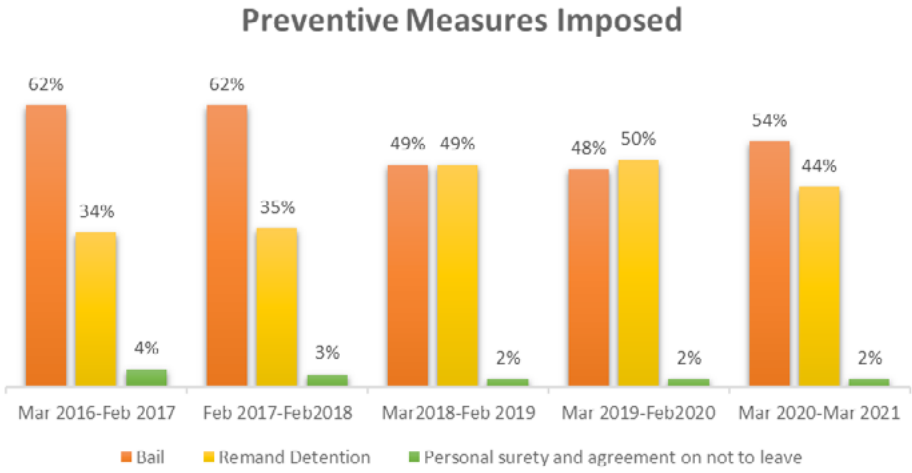
65 During the reporting period, the GYLA's monitors attended 53 court hearings with the participation of interpreters. In all of the cases, the interpreters had to repeat the translation, and in one case, the court changed the interpreter due to the defendant's dissatisfaction with the translation.

Chart №2



The chart below provides information on imposed prevention measures (from March 2016 through March 2021).

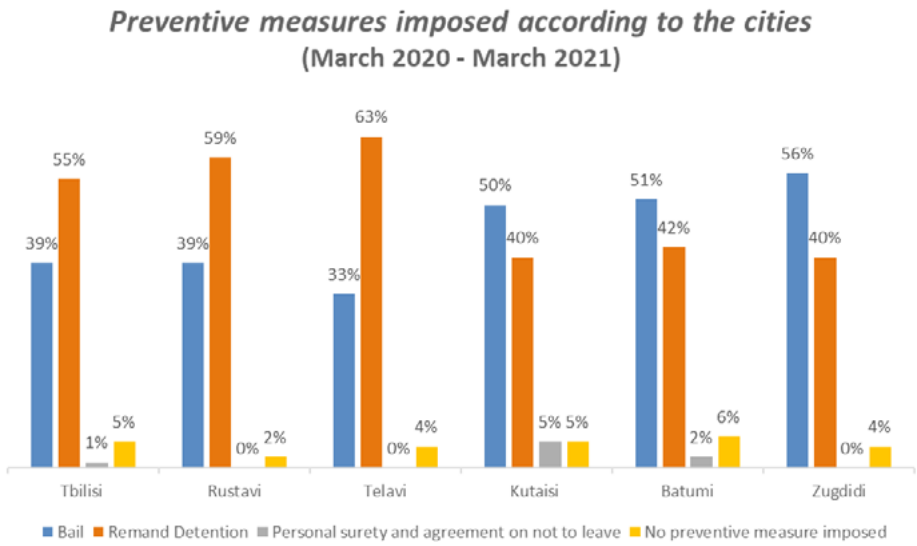
Chart №3



The following chart shows the preventive measures imposed according to the cities (from March 2020 through March 2021).[66]

66 In the current reporting period, the GYLA monitors attended **in Tbilisi City Court** 207 hearings against 249 defendants, of which 96 (39%) defendants were released on bail in 80 hearings, of which 45 defendants were detainees, and in 114 hearings, the court ordered to imprison 138 (55%) persons, of which 21 defendants did not appear in court as detainees. In 2 cases, the court imposed the agreement on not to leave the country and appropriate behavior against 2 (1%) accused persons, while in 11 hearings, the court did not apply a measure of restraint at all against 13 (5%) defendants. **In Rustavi City Court** –

Chart №4



Informing the accused of his or her rights and responsibilities at the first court hearing is of special strict importance, which acquires even greater weight at the virtual hearing. A number of court hearings were accompanied by a problem with the quality of internet connection, which worsened the audibility during the hearing and led to the termination of several trials. The monitoring revealed that judges concluded the first appearance court hearings in up to 20 minutes in 170 (43%) out of 393 cases, and in 109 (27%) cases, the hearing did not exceed

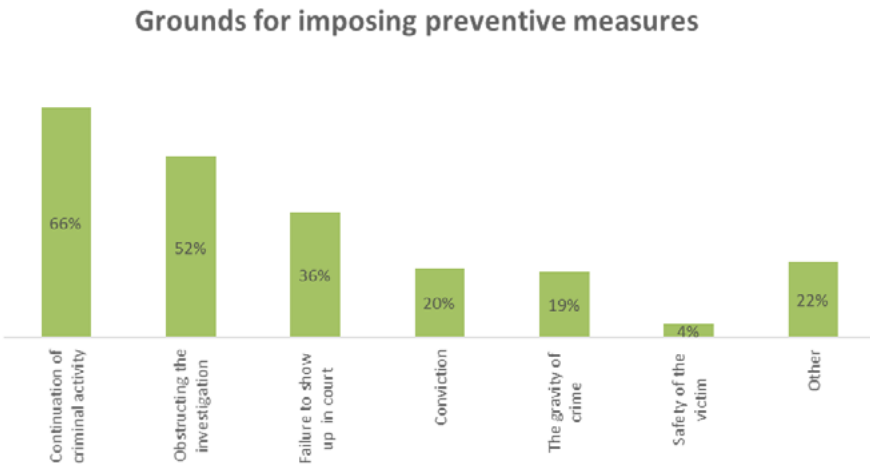
during 34 hearings against 51 defendants, 20 (39%) defendants were sentenced to bail in 18 trials, of which 3 were remanded in custody. At 15 hearings, 30 (59%) defendants were detained, of which 2 persons were not detainees, and 1 (2%) person was not subjected to any form of a restraining measure by the court. The GYLA monitors attended 49 hearings in **Batumi City Court** with the participation of 53 defendants. The court imposed bail against 27 (51%) defendants at 24 hearings, of which 13 were remanded in custody, while in 21 hearings, 22 (42%) accused were imprisoned (2 were not detainees), in 1(2%) case, the court applied an agreement on not to leave the country and to behave properly, and left 3 (6%) accused without a measure of restraint. The GYLA's monitors attended 22 hearings against 25 defendants in **Zugdidi District Court**. At 13 hearings, the court granted bail for 14 (56%) defendants, of which 5 were imposed custodial bail, and in 8 hearings, 10 (40%) accused were remanded in custody by the court, while 1 (4%) accused was left without a measure of restraint. **In Kutaisi City Court** - during 60 hearings against 62 defendants, the court sentenced 31 (50%) defendants to bail in 31 hearings, out of which 12 defendants were imposed a custodial bail, and in 24 hearings - 25 (40%) defendants were remanded in custody. At 2 trials the agreement on not to leave the country and to behave properly was applied to 3 (5%) defendants. At 3 court hearings - 3 (5%) accused were left without a restraining order. In **Telavi District Court** - during 24 hearings against 24 defendants, in 8 trials the court applied bail to 8 (33%) defendants, out of which 3 defendants were sentenced to custodial bail. At 15 hearings, 15 (63%) persons were sentenced to imprisonment, of which 1 was not a detainee, and 1 (4%) accused was left by the court without a measure of restraint.

15 minutes. **Here, it is important to note that during one of the remote hearings in the Tbilisi City Court, it took the court just 8 minutes to determine that the proper conduct of the accused in the theft case could only be ensured by imprisonment.**

GYLA believes that the explanation of the rights and responsibilities to the accused must not be just reading out of the rights with the use of legal terminology. In all cases, the court should strive to inform the accused thereof in a language he or she understands, explain the essence of the rights granted by law. Otherwise, the opportunity to exercise the rights is at stake.

The chart below shows the grounds for the imposition of preventive measures (from March 2020 through March 2021).

Chart №5



In the reporting period, the prosecutors, when providing the substantiation for restrictive measures, referred to a crime committed in the past by the accused, for which he or she had been diverted from criminal prosecution. It was with this argument that the prosecution sought to increase the susceptibility to deviant behavior on the part of the accused. We believe that disclosing information about the diversion contradicts the purpose and principles of the diversion. Besides, several cases were identified where the prosecution referred to an overturned conviction when talking about the personal characteristics of the accused. We believe that the above should not be used as an argument to substantiate the position, and information about the cancellation of the defendant's conviction should not be disclosed at the first court hearing of the accused.

TYPES OF RESTRAINING MEASURES AND THE MAIN TRENDS IN THEIR APPLICATION

IMPRISONMENT

Introduction

Imprisonment, due to its nature of interference with the right to liberty, is permissible only if it is the only way to avoid absconding of the accused and obstructing the administration of justice, interference by the accused in obtaining evidence and committing a new crime by the accused.[67]

It is important that in all cases imprisonment must be used in the existence of appropriate grounds and not as an opportunity to exert indirect pressure on the detainee in exchange for his or her easy control or release.

Identified results

The imprisonment rate in the current reporting period was 54%, which compared to the previous reporting period[68] is an increase of four percent. The prosecution requested pre-trial detention as a measure of restraint against 333 (72%) defendants, the court did not accept the motion filed by the prosecution with respect to 93 (28%) defendants as it did not consider it reasonable to order detention as a measure of restraint, in 4 cases, the arrest was deemed unlawful and non-custodial bail was imposed instead.

In the previous reporting period, the rate of the court granting the motions requesting pre-trial detention was 74%, while in the given reporting period the figure decreased by two percent and amounted to 72%. According to GYLA, 66 (27%) out of 240 preliminary detentions imposed were unsubstantiated or insufficiently substantiated.[69]

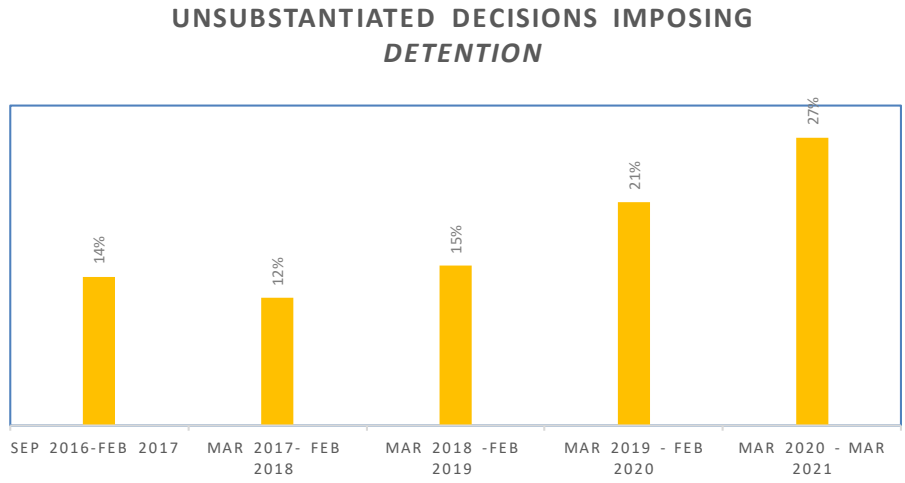
67 Criminal Procedure Code, Article 205.

68 GYLA Report "Main tendencies and challenges outlined in four-year criminal court monitoring" p. 17. (2021), available at: https://bit.ly/3yrrTql. [Last viewed: 28.07.2021].

69 GYLA deems the pre-trial detention unsubstantiated or insufficiently substantiated if the threats posed by the accused can be prevented through other less severe measures of restraint and/or when the grounds for the imprisonment are abstract and hardly

The chart below shows the rate of unsubstantiated decisions ordering imprisonment as a measure of restraint (from September 2016 through March 2021).

Chart №6



corresponding to real circumstances, as well as if at the hearing, the judge does not discuss why other lenient measures of restraint can fail to ensure the proper conduct of the accused.

BAIL

INTRODUCTION

The accused, or the person posting the bail, shall ensure the proper conduct of the accused.[70] The minimum amount of bail cannot be less than GEL1000 while the maximum amount is not defined by law and depends on the financial capabilities of the accused. In case of thorough fulfillment of the requirements imposed on the accused, the bail amount shall be refunded to the person posting the bail within one month after the enforcement of the verdict. In addition, the law provides for the provision of the bail in the form of real property, which, however, may sometimes be associated with the risk of losing all or a part of the property, but for the conscientious and disadvantaged defendants, bail is often a means to escape jail.

The law recognizes cases where bail is guaranteed with detention, in which case defendants remain in custody until the bail is paid or property equivalent to the bail is deposited. Sometimes the amount of bail ordered for the accused is so disproportionate to the financial capabilities of the accused that the latter is unable to escape from the imprisonment through bail. In such scenarios, the defendants, who do not necessarily pose a threat or danger to the public and whose isolation is not necessary to achieve the goals of a preventive measure, are forced to remain in jail merely for the lack of funds. This imposes much higher responsibility on the prosecution and the court to thoroughly examine and assess the gravity of the crime committed as well as the property possibilities of the accused.

Identified results

In the reporting period, the GYLA monitors attended 174 first appearance court hearings during which the court imposed bail as a measure of restraint against 196 (44%) defendants. The court used pre-trial detention in 81 (41%) cases to secure bail. **In 4 cases the court found the detention unlawful** and did not impose bail on the accused, and in **2 cases the judge did not consider remand detention necessary to secure bail.**

70 Criminal Procedure Code of Georgia, Article 200, (1).

The Prosecutor's Office presented 85 motions requesting bail as a measure of restraint. Of these, in 73 (86%) cases, the court considered the motion to be partially unsubstantiated in the part of the amount and reduced the amount of bail in one case by GEL 10,000, and in several cases by GEL 6,000. Of the 85 motions for bail filed with the court,[71] the prosecution requested the minimum amount of bail in merely 2 cases.[72]

For the illustration, please see the following example of an unjustified bail motion and the adequate approach of the court:

The person was charged with violating the rules of transport safety, which resulted in less serious damage to bodily health (Article 276(2) of the CC).

The prosecutor spoke positively about the accused at the hearing, saying that the diversion agreement had not been reached due to the victim's objection. The prosecutor said that in 2021, the Law of Georgia on Amnesty came into force, which made it possible to amnesty Article 276(2) with the consent of the victim, but the victim refused to do so. In view of the above, and by referring to the threat of absconding, the prosecution requested bail in the amount of GEL 3,000 as a measure of restraint. The court did not accept the prosecution's position and did not impose any restraining order on the accused.

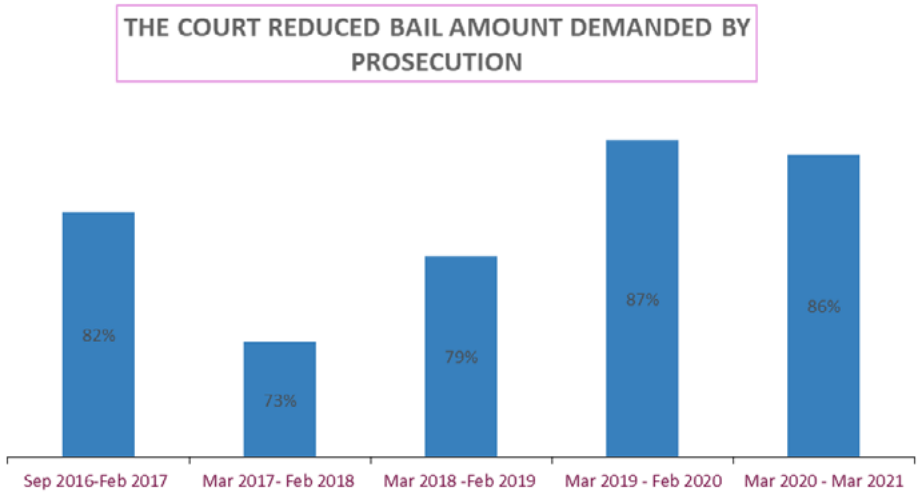
The above example clearly shows that the prosecution tends to demand larger sums of money than a minimum amount of bail even with respect to the defendants whom it characterizes positively and whom it failed to divert from criminal prosecution only because of the victim's position.

The following chart shows the rate of the court reducing the bail amount requested by the Prosecutor's Office (from March 2016 through March 2020-2021).

71 Without securing it with custody.

72 The majority of the crimes for which the Prosecutor's Office requested the minimum amount of bail were merely 2 cases. Article 151 (1), 126 (1), 177 (1), 260 (1), 362 (1), 273 (2), 180 (1,2,3), 19-344, 353^1 of the Criminal Code of Georgia. All other offenses, as most of the ones listed above, were not related to violence.

Chart №7



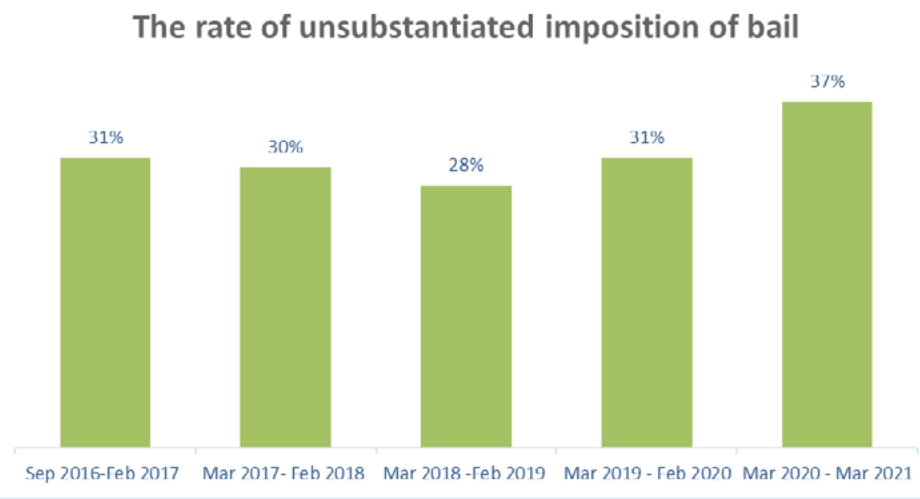
The image clearly shows that in the last five years, the court has reduced the amount of bail requested by the prosecution in at least 70% of cases. Despite such experience, even in the face of the pandemic, the prosecution unjustifiably demands large amounts of bail, which is evidenced by the 86% reduction in bail amount by the court during the reporting period.

The bail applied to 71 (37%) defendants at the initial court hearings was unsubstantiated or its reasonableness was inadequately substantiated. In the previous reporting period, the rate of unsubstantiated bail was 31 percent.[73]

The chart below shows the rate of unsubstantiated imposition of bail identified by the GYLA's monitoring (from September 2016 through March 2021).

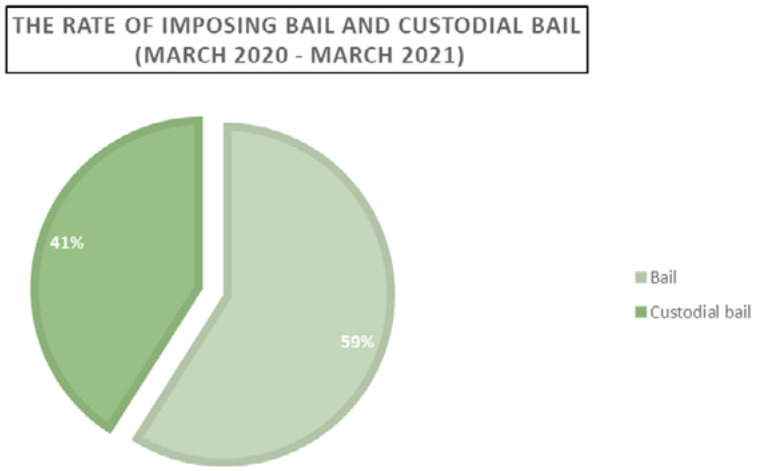
73 GYLA's Criminal Court Monitoring Report №14, p. 33; Here you can see the rate of unsubstantiated use of bail from October 2011 through February 2020. Available at: https://bit.ly/3ycCBzP. [Last viewed: 29.07.2021].

Chart №8



The following chart shows the rate of imposition of bail and custodial bail (from March 2020 through March 2021).

Chart №9

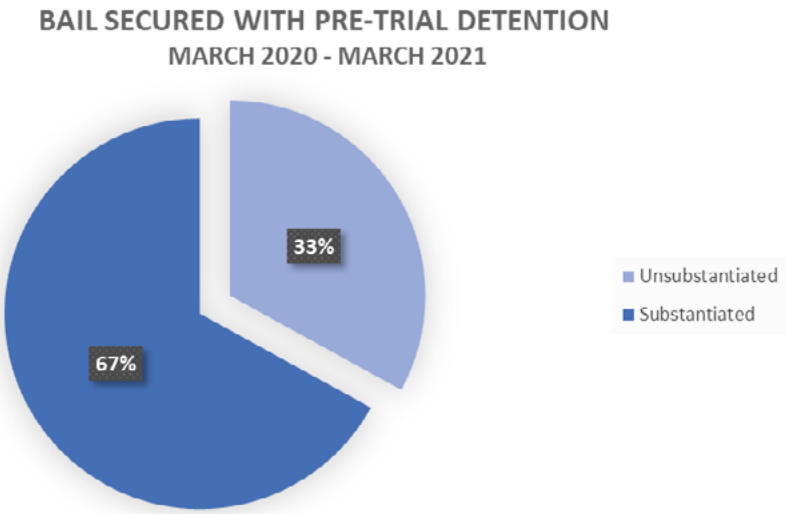


Under the pandemic situation, the unemployment rate in the country increased, however, despite this, the prosecution demanded a minimum amount of bail in merely 2 (1%) cases. Even among the accused who were sentenced to custodial bail were those whose bail was not substantiated. Such defendants find themselves in a far more difficult situation. They are taken directly from the courtroom to the jail and have to remain there groundlessly until the bail is deposited. Defendants who are ordered to pay unreasonably high bail are often doomed

to imprisonment prior to sentencing. In order to prevent the increase in the so-called "unacknowledged detention," the prosecution and the court must pay more attention to the property status of the accused. Of the custodial bail imposed against 81 (41%) defendants, 27 (33%) were unsubstantiated or poorly substantiated.[74]

The chart below shows the rate of imposing bail secured with pre-trial detention (from March 2020 through March 2021).

Chart №10



The attitude of a judge of the Tbilisi City Court towards the accused should be positively assessed.

For the illustration, please see the example below:

> The prosecution demanded imprisonment against the arrested defendant who was not represented by a lawyer. Having answered the questions of the judge, it was revealed during the hearing that even in case of a minimal amount of the so-called custodial bail, the arrested defendant would not be able to pay it because he did not have a close relative who would take an interest in his fate and help to post the bail. The judge could not see the grounds for detaining the accused and **on his or her**

74 GYLA deems the bail to be unsubstantiated or insufficiently substantiated if the threats posed by the accused are not substantiated and the amount of the bail does not correspond to the gravity of the crime committed and the property status of the accused.

own initiative sentenced the accused to bail in the amount of GEL 1000, without securing it with custody.

Presumably, the judge considered that the bail secured with detention would have been covert imprisonment as no one would pay the bail for the accused.

GYLA believes that the judge accurately explained the reasonableness of pre-trial detention in case of ordering bail. To the judge, the adequate interpretation of the law and taking into account the interests of the accused turned out to be of higher priority than the established practice, which, despite the groundless imprisonment for a certain period of time, still deprives the accused of his freedom.

AGREEMENT ON NOT TO LEAVE THE COUNTRY AND BEHAVE PROPERLY

An agreement not to leave the country and behave appropriately can be used as a measure of restraint against defendants whose sentence for any alleged crime does not envisage more than one year of imprisonment.[75]

During the reporting period, the agreement on not to leave the country and appropriate conduct could have been applied as a measure of restraint against 29 (6%) defendants. However, the Prosecutor's Office did not request the agreement on not to leave and proper conduct for any of them, and the court on its own initiative ordered the above-mentioned form of restraint only for 6 (20%) defendants.[76] It should be noted that in these six cases, the Prosecutor's Office requested to impose preliminary detention on three defendants and bail on the other three, in two cases in the amount of GEL 2000-2000 and in one case in the amount of GEL 5000.

For the illustration, please see the following example of the use of the agreement on not to leave the country and to behave properly:

The defendant was charged with non-fulfillment of the court judgment (Article 381 (1) of the CC). The prosecution requested bail in the amount of GEL 5,000 as a measure of restraint. The prosecution failed to present any reasonable grounds to substantiate the restraining order. The judge found

75 Criminal Procedure Code, Article 202.

76 Of these, the Tbilisi City Court used it in 2 cases, the Kutaisi City Court in 3 cases, and the Batumi City Court in 1 case.

out the property capabilities of the accused at the hearing. The defendant explained that he was employed in a car park where his daily income did not exceed 10 GEL. Having analyzed the gravity of the crime committed by the accused and his property status, the judge did not consider it necessary to use bail, especially in the amount of GEL 5,000, and applied the agreement not to leave the country and to behave properly to prevent any threats from the accused.

GYLA has reiterated in its reports that linking the agreement on not to leave the country and behave properly to one-year imprisonment requirement often hinders the parties and the court to request and use the restraint measure. We believe that it is important to regulate the norm in a timely manner at the legislative level so that the agreement on not to leave and conduct appropriately does not depend on the specific size of the sentence, which will make this measure of restraint more flexible and effective.

PERSONAL SURETY

In contrast to the agreement on not to leave the country and to behave appropriately, the court never used personal surety - another alternative measure to pre-trial imprisonment and bail - in the reporting period.

In the case of a personal surety, the trusted persons undertake in writing that they will ensure the proper conduct of the accused and his or her appearance before the investigator, the prosecutor, or the court and if the accused commits an act to which the bail has been imposed, the court may decide as per a motion of each party impose a fine on each guarantor. The number of sureties is determined by the court. The personal surety is allowed only if the accused and the guarantor consent to do so.[77]

The monitoring revealed that none of the 464 defendants were able to find a trusted person who would guarantee their proper conduct. The infrequent use of this preventive measure is also due to the reluctance of the defense. During the reporting period, the defense lawyers never requested the restraining measure, nor did they present any relevant person as a personal guarantor. The defense must be extremely focused on taking into account the interests of the accused and create all the conditions for the application of less severe measures of restraint against the accused, including, if necessary, make efforts to timely locate suitable guarantors.

77 Criminal Procedure Code, Article 203.

ADDITIONAL OBLIGATIONS

Along with a measure of restraint, the following can be also imposed on the accused: an obligation to appear in court at the specified time or upon summons; prohibition to engage in certain activities or professions; an obligation to show up and report daily to the court, police or other state body at different intervals; supervision by the agency designated by the court; electronic monitoring; an obligation to remain in a certain place during certain hours or without that; prohibition to leave or enter certain places; prohibition to meet with certain individuals without special permission; an obligation to surrender a passport or any other identity documents; any other measures determined by the court that are necessary to achieve the goals of a specific measure of restraint.[78]

The courts actively imposed additional obligations apart from using bail as a preventive measure. It should be noted that individuals accused of narcotic drug-related crimes were often required by the court to undergo expert examinations at their own expense and to submit the results of such examinations to the investigating body before the pre-trial hearings. In such cases, the court was supposedly aiming to prevent narcotic drug crimes but for the defendants, this decision of the court, in addition to collecting the bail amount, was an extra heavy burden. There were cases when the court forbade the accused to leave the house for a certain period of time, and the cases when along with the bail imposed as a preventive measure, the accused was placed under electronic surveillance and was prohibited to leave his place of residence (house) without informing and obtaining the consent of the investigating body.

We believe that the above severe restriction is practically equivalent to house arrest. Therefore, due to its strict prohibitive nature, electronic monitoring must not remain on the list of additional restraining measures.

It is also necessary to strike a right balance between the amount of bail and additional obligations, especially that the Code of Criminal Procedure recognizes only the possibility of appealing a preventive measure already imposed on the accused and does not allow to challenge an additional obligation separately, even if it seems more severe than the form of measure of restraint, even bail.

78 Criminal Procedure Code, Article 199(2).

COURT HEARINGS WHERE THE COURT DID NOT IMPOSE ANY RESTRAINING MEASURE

The Criminal Procedure Code of Georgia entitles the court not to use a measure of restraint against the accused unless there are relevant threats.

During the reporting period, in 22 court hearings, no restraining measure was applied against 22 (5%) defendants. In 6 cases, the accused persons had already been remanded in custody for other crimes. The prosecution, therefore, did not file a motion to impose a preventive measure. The prosecution requested the pre-trial detention in 5 cases, which the court did not grant, in one case the accused was remanded in custody in a different case, and in another case, the defendant had been already convicted for other crimes and in 3 cases, the court did not consider the requested detention substantiated. In 11 cases, the prosecution demanded bail, which was not granted by the court, of these, only in one case the defendant had already been bailed for another crime. It should be noted that in 3 cases the prosecution demanded bail in the amount of GEL 2000 and GEL 3000 for the cases where a period of up to two years had elapsed from the commission of the crime.

For the illustration, please see the following example where the court left the accused without a preventive measure:

> The person was charged with non-fulfillment of the court judgment that entered into force (Article 381(1) of CC). In particular, the verdict forbade him to drive a car. The prosecution demanded bail in the amount of GEL 3,000, citing the defendant's refusal to sign a plea agreement as one circumstance confirming the threat the accused was posing and another argument that the accused would go hiding for the fear of the imminent guilty verdict. At the hearing, the defense lawyer explained that the defendant's dog was hit by a car and he rushed the animal to a veterinary clinic. The defendant was on probation at the time of the incident. Had he not violated the terms of the probation, he would have shown up before the investigative authority and reported about the fact. The defendant explained that his action was motivated by urgent necessity and had no intention of committing a new crime or absconding. The court rejected the prosecution's motion and did not impose any form of restraining measure on the accused.

JUDICIAL OVERSIGHT OVER THE LAWFULNESS OF DETENTIONS

INTRODUCTION

The right to liberty is guaranteed by the Constitution of Georgia.[79] An arrest is a short-term restriction of a person's liberty. A person is considered detained from the moment of restriction of his or her freedom of movement.[80] The ground for the arrest shall be a well-founded assumption that a person has committed an act punishable by imprisonment; may abscond or not appear before the court; may destroy information relevant to the case or commit a new crime. In the presence of the above grounds, according to the place of jurisdiction, the court, upon a motion of the prosecutor, shall issue a ruling on the arrest of the person without an oral hearing.[81] The legislator, in the existence of specific circumstances, allows for the possibility of detaining a person without a ruling, on the grounds of urgency. In such cases, the judge shall review the lawfulness of the detention at the first court hearing of the accused and analyze the necessity of arresting the person without a court ruling. In the event that an arrest is deemed unlawful, the law grants the accused the opportunity to claim and receive compensation for the damage caused through the conducted activity through civil and/or administrative proceedings.[82] The decision on arrest cannot be appealed, which further adds more importance to the examination and evaluation of detention at the first appearance hearing, conducted both in urgent necessity or with a prior warrant of the court.

Analysis of court hearings

Reviewing the lawfulness of arrest at a public hearing remains a problem. The legality of the detention of persons arrested with a prior warrant of the court is not discussed publicly at the first appearance court hearings. The court does not review the procedure of the arrest, nor does it show any interest in how lawful the detention procedure was, and merely assesses the legality of the detention conducted in urgent necessity at a public hearing if the defense lawyer mentions and complains about the unlawfulness of the detention. We believe that every arrest must be analyzed at the first appearance court hearing, irrespective of

79 Constitution of Georgia, Article 13(1-6).

80 Criminal Procedure Code, Article 170 (1,2).

81 Ibid.

82 Article 38 (11) of the Criminal Procedure Code; Article 18 (4) of the Constitution of Georgia.

the fact the court warrant was issued or not. According to judges, the court assesses the lawfulness of the detention regardless of whether it is considered in a public hearing or not. However, the court rulings delivered in various periods that GYLA analyzed have shown that in a number of cases not only do courts not consider the lawfulness of detention in a public hearing but often the issue is not sufficiently substantiated in court judgments. The rulings do not offer clear arguments why the court considered the arrest lawful, what circumstances the court relied upon, and whether the urgent necessity really existed to arrest a person.[83]

In the reporting period, 299 (64%)[84] defendants appeared before the court as detainees at the 256 first appearance hearings. The monitoring revealed that 16 (5%) accused had been detained based on a prior ruling of the court, 27 (9%) were arrested under urgent necessity, and the grounds for arresting the remaining 256 (86%) persons are unknown, since the matter was neither discussed nor even mentioned by the judge at the hearing.

There was a case when the judge examined the lawfulness of the arrest on his or her own initiative and declared the detention illegal.

For the illustration, please see the following example of unlawful detention:

> The prosecution requested imprisonment as a measure of restraint against the accused. The defendant pleaded guilty at the trial and requested to be subjected to a minimum amount of bail. The accused was not represented by a lawyer. The court reviewed the issue of detention at the hearing and asked the accused about the circumstances of his arrest. The defendant replied that first, the police officers had appeared at his residence, after which he voluntarily followed them to the police unit where he was interviewed as a witness and later got arrested. The court became assured that no grounds existed for detaining the accused and released him from custody imposing the bail in the amount of GEL 1,000 as a measure of restraint.

At the above court hearing, the defendant did not have a lawyer and had the court not reviewed the lawfulness of the detention, the accused would not have been able to independently file a motion to declare his arrest unlawful.

83 GYLA Report "Main tendencies and challenges outlined in four-year criminal court monitoring" p. 35. (2021).

84 During the reporting period from March 2016 through February 2017, 140 (48%) out of 290 defendants appeared in court as the detainees; in the following reporting period –218 (54%) out of the 402 accused; in the subsequent reporting period - 452 (68%) out of 668; in the reporting period from March 2019 through February 2020, 518 (76%) out of 686 defendants.

The issue of the lawfulness of detentions was discussed at 11 case hearings. In 5 of these, the defense lawyer did not at all complain about the illegality of the detention, yet the judge reviewed the lawfulness of the arrest in a public hearing, and in two of these cases asked questions to find out if the grounds for the arrest of the accused really existed. In the other 6 cases, the lawyer presented a motion.

At one of the court hearings, the accused declared that he had been arrested at the moment when it was restricted to move on the street, therefore he was not able to present witnesses to prove his truth. We believe that a video recording in such cases could have added more clarity to the diverse positions of the parties regarding the arrest.

Of the 4 reported cases of the arrests that were deemed as unlawful, 3 defendants were arrested on the ground of the threat of absconding while they were in the administrative building of the police. The court noted "... arresting the accused in the police station and referring to the risk of absconding in the arrest protocol goes beyond any legal framework."

ADMISSIBILITY OF EVIDENCE AT PRELIMINARY COURT HEARINGS

INTRODUCTION

At the preliminary court hearing, the judge shall consider motions of the parties on the admissibility of evidence, decide to terminate the prosecution or transfer the case on the merits, as well as consider the other motions presented by the parties.[85] At the preliminary court trials, the parties agree upon the disputed and indisputable evidence. If the accused has been charged with a criminal act deliberated by a jury trial, the judge is obliged to explain to the accused the rules of the jury trial and the rights of the accused related thereto, also to find out whether the accused agrees to have his or her case heard by a jury. In the event that the accused agrees to the jury trial, the judge shall schedule a jury selection session.[86] A verdict rendered as a result of the merits hearing is mostly based on the evidence recognized as admissible at the preliminary court hearing.

Analysis of court hearings

In the reporting period, the GYLA monitors attended 444 preliminary court hearings against 539 defendants.

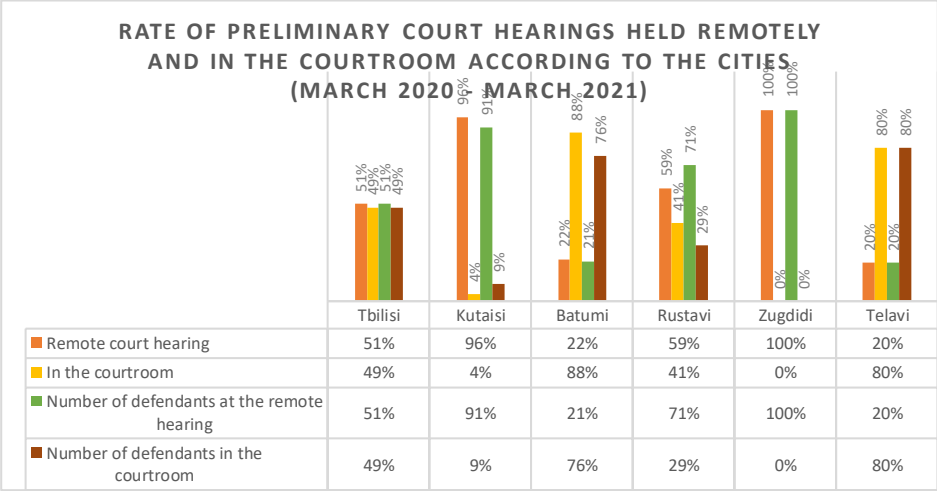
The chart below shows the rate of preliminary court hearings held remotely and in the courtroom (from March 2020 through March 2021).[87]

85 Criminal Procedure Code of Georgia, Article 219.

86 Criminal Procedure Code of Georgia, Article 219, 3.

87 The GYLA monitors attended at **Tbilisi** City Court 152 preliminary court trials against 188 defendants, including 81 remote hearings against 96 defendants; 77 trials in **Batumi** City Court against 81 defendants, of which 17 were virtual hearings against 17 defendants; 72 trials in **Kutaisi** City Court against 81 accused, including 69 remote hearings against 74 accused. 61 trials were held in **Rustavi** City Court against 98 defendants, 36 hearings were held remotely against 69 defendants. The **Telavi** District Court held 7 hearings against 7 defendants remotely and 28 hearings against 28 defendants in the courtroom. The GYLA monitors in **Zugdidi** District Court attended 45 remote hearings with the participation of 46 defendants.

Chart №11

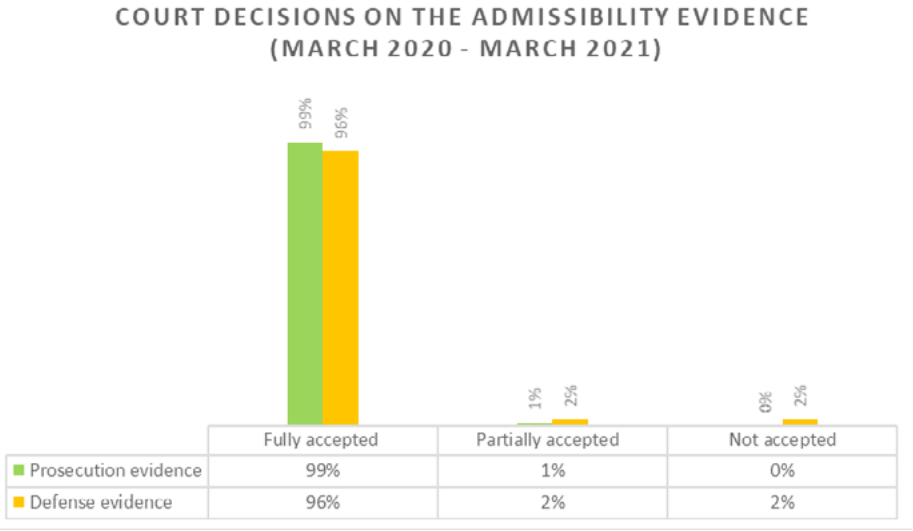


	Tbilisi	Kutaisi	Batumi	Rustavi	Zugdidi	Telavi
Remote court hearing	51%	96%	22%	59%	100%	20%
In the courtroom	49%	4%	88%	41%	0%	80%
Number of defendants at the remote hearing	51%	91%	21%	71%	100%	20%
Number of defendants in the courtroom	49%	9%	76%	29%	0%	80%

In terms of admissibility of evidence at the preliminary court hearing, the court is largely impartial and is guided by the requirements of the law on the admissibility of evidence.

The following chart shows the percentage of court decisions accepting the evidence presented by the prosecution and defense (from March 2020 through March 2021).

Chart №12



	Fully accepted	Partially accepted	Not accepted
Prosecution evidence	99%	1%	0%
Defense evidence	96%	2%	2%

At 444 preliminary court hearings, the prosecution presented the motions re-

questing the admissibility of evidence at 404 (90%) hearings. The remaining hearings, which the GYLA monitors attended, were either postponed or extended. Therefore, we can say that the prosecution, where it was necessary, presented evidence at every hearing. In 121 (30%) cases, the defense lawyer declared the evidence of the prosecution undisputed and in 22 (5%) cases requested to have the evidence declared inadmissible. The court in 399 (99%) cases fully accepted the motions of the prosecution on the admissibility of evidence, and in 5 (1%) cases partially upheld them.

The defense lawyer requested the admissibility of evidence at 118 (26%) hearings. In the previous reporting period, the rate of the defense presenting the evidence was 34%. This number decreased by 8 percent in this reporting period, which may be related to the difficulty of obtaining evidence due to the Covid-19 pandemic constraints. The prosecution recognized the evidence presented by the defense undisputed in 35 (29%) cases and petitioned for the inadmissibility of evidence in 7 (6%) cases. The court granted the defense motions at 114 (96%) hearings and declared the evidence admissible, in 2 cases partially accepted, and in 2 cases, the motion of the defense regarding the admissibility of evidence was rejected.

The defendants were represented by lawyers at 357 preliminary court hearings. It is noteworthy that if in the past defense lawyers presented as evidence mainly the characteristics of the personality of the accused and rarely the protocols of interrogations, in the current reporting period, there were cases when the defense side submitted 18 expert examination reports, 74 witness interview protocols, 9 inspection protocols, etc, which were obtained by the defense lawyer himself.

Although the burden of proof rests with the prosecution in presenting evidence proving the innocence of the accused in court, the activity of the defense lawyer must be highly appreciated.

During the reporting period, the criminal prosecution was terminated in none of the cases.

THE INVESTIGATIVE ACTION - SEARCH AND SEIZURE

INTRODUCTION

If there is a reasonable suspicion of a crime, the search and seizure are carried out in order to find and remove an item, document, substance or other object containing information relevant to the case.[88] This investigative action carries the risk of unlawful interference in the privacy of individuals; therefore, it must be subject to strict judicial control.

The law provides for the possibility of search and seizure in two ways – as per a court ruling (with a prior warrant) and in case of urgent necessity - on the basis of an investigator's decision.[89] In the event of urgency, the court shall then examine the lawfulness of the search and seizure, and the prosecution must submit a solid substantiation of why it acted under the urgent necessity and what substantial harm obtaining the court's order would have caused.

Identified results

During the reporting period, the Prosecutor's Office had obtained a prior court ruling for a search/seizure in only 8% of the cases,[90] in 49 (**63%)** out of 78 cases, the search/seizure was carried out by the Prosecutor's Office under urgent necessity, while in 23 (29%) cases, it was impossible to determine the manner of conducting the above investigative procedure.

With regards to legalizing by the court of a search and seizure conducted in urgent necessity, the observation confirms that the court, just like in previous years, mostly grants such motions. In particular, in 44 (90%) out of 49 cases, the search/seizure conducted by the prosecution under the circumstances of urgency was recognized by the court as lawful.[91]

88 Criminal Procedure Code, Article 119 (1).

89 Criminal Procedure Code, Article 120.

90 In 6 out of 78 cases.

91 In the remaining 5 (10%) cases, it was not disclosed at the trial whether the judge had legalized the urgent search/seizure conducted by the prosecution.

In order to obtain comprehensive information, GYLA requested search-seizure court rulings and the annual statistics thereof from 5 courts in the period from January 2016 to July 2020 inclusive. It was found that urgent searches/seizures were granted by the courts in almost all cases. As per the information provided by the Tbilisi, Kutaisi, Rustavi City Courts and Telavi District Court, the rate of rejection of the motions in the mentioned courts did not exceed 1% in the five-year period. It is also noteworthy that during the period, the number of searches and seizures under urgent necessity was increasing every year, whereas the statistics of the court refusing such motions were decreasing. If in 2016 the rejection rate was 11%, it never exceeded 0.5% in the period from 2017 through 2019.[92]

The court, when delivering a guilty verdict, often relies upon a search/seizure report and the physical evidence removed. The investigative action is often conducted based on a report drawn up on operative information, and the prosecution often interviews in the court police officers participating in the same investigative actions, who, like the prosecutor, represent the side of the prosecution. Thus, in a number of case proceedings, especially in narcotic drug-related crimes, the court relied upon non-impartial evidence to establish the standard beyond a reasonable doubt to further build up a guilty verdict. The Constitutional Court of Georgia has declared unconstitutional the normative content of Article 13, Paragraph 2 of the Criminal Procedure Code of Georgia (CPC), which allows for the use of an illegal item seized as evidence when the possession of the seized item by the accused is confirmed only by the testimony of law enforcement officers, who could, but did not take appropriate measures to obtain neutral evidence proving the credibility of the search.[93]

GYLA litigated two cases in the European Court of Human Rights, which found the violation of Article 6 (1) of the European Convention (right to a fair trial) by the state.[94] In both cases, the guilty verdicts handed down by the common courts were based solely on the operative record of the search, the testimony of the police officers who carried out the search and arrest procedures, and the evidence obtained during the search. The European Court held that the applicants' search-

92 GYLA Report "Main tendencies and challenges outlined in four-year criminal court monitoring" p. 49. (2021).

93 Judgment of the Constitutional Court of Georgia №2/2/1276 of December 25, 2020, available at: https://www.constcourt.ge/ka/judicial-acts?legal=10430. [02.08.2021].

94 Megrelishvili v. Georgia (Application no. 30364/09). The ruling is available at: https://hudoc.echr.coe.int/eng#{%22itemid%22: [% 22001-202419% 22]. Tlashadze and Kakashvili v. Georgia (Application no. 41674/10). The ruling is available: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208752%22}. [02.08.2021].

es were carried out on the basis of operative information, without a prior ruling of a judge, the accuracy and reliability of which were not adequately assessed by the national courts at either the preliminary or substantive hearings.[95]

> During the monitoring, GYLA attended the criminal case proceedings against Giorgi Rurua. The ground for launching an investigation into the case was a report drawn up by detective-investigators of the Ministry of Internal Affairs on the ground of operative information, claiming that Giorgi Rurua committed an alleged crime. It is important to note that on the basis of the operative information, Giorgi Rurua was arrested and searched in a place that was not equipped with video surveillance cameras. It is also noteworthy that Giorgi Rurua had driven quite a distance falling within the CCTV cameras until reaching the area where he was commanded to stop. Besides, the arrest, personal search, and the search of the vehicle of Giorgi Rurua were not filmed. During the interview in the court, the law enforcement officials declared they **had no obligation to film the process.** One of the patrol police officers said that he had **left his body camera in the dashboard** of the car. Another officer said that his partner told him not to turn on the body camera because they were not taking part in the investigative action and their duty was merely to stop the car. As regards the external camera in the patrol police car, the police officers claimed it was out of order. Although the patrol police are equipped with body cameras, the obligation to switch them on per the law arises when a special police control is being carried out.[96]

Based on the above-mentioned decision of the Constitutional Court, the third paragraph was added to Article 13 of the CPC with the following content:

"If the search or seizure was carried out on the basis of anonymous report or information received from a secret officer (confidant)/confidential source as defined by the Law of Georgia on Operative-Investigative Activities and in accordance with the procedure established by Article 112(1)(5) of the Criminal Procedure Code[97] and an illegal object, item, or substance has been seized, the latter may

95 GYLA's Statement: "The European Court has found a violation in the case of drugs and guns." Available at: https://bit.ly/3fOlspN. [02.08.2021].

96 Law of Georgia on Police, Article 24, Paragraph 5.

97 Article 112(1) of the Criminal Procedure Code defines the procedure for investigative actions carried out under a court warrant, and the fifth paragraph of the same article defines the preconditions for conducting an investigative action in urgent necessity and the timeframes for appealing to a court. Available at: https://www.matsne.gov.ge/ka/document/view/90034?publication=136. [05.08.2021].

be applied as the basis for a guilty verdict if the possession of an unlawful object, item, or substance[98] by a person is confirmed by other evidence apart from the testimony of the investigator conducting the investigation, the testimony and the protocol of the relevant investigative action by the investigator participating in the investigative action, a person participating in the operative-investigative activity. This rule shall not apply when it is objectively impossible to obtain/present other evidence."[99]

We believe that the amendment does not fully address the risks and spirit provided for in the motivational part of the Constitutional Court, does not oblige the prosecution to videotape the search/seizure, and provides an ample opportunity not to try to find neutral evidence, which can be obtained with advanced technology.

98 **A note** to Article 13 of the Criminal Procedure Code: "An illegal object, item, or substance" for the purposes of this Article means an explosive device, an explosive substance, a weapon, ammunition as per the Law of Georgia "On weapons", a substance subject to special control under the Law of Georgia on "Narcotic drugs, psychotropic substances, precursors, and drug aid," a substance provided for the Law of Georgia "On New Psychoactive Substances," the possession, purchase, storage, transportation or transfer of which constitutes a crime.

99 The Law of Georgia "On Amendments to the Criminal Procedure Code," 28/06/2021, is available at: https://bit.ly/3iPY5wj.[05.08.2021].

COURT TRIALS REVIEWING MEASURES OF RESTRAINT

INTRODUCTION

The judge of the preliminary court trial, at the initiative of the party, and in the case of detention - on his or her own initiative, shall consider a motion to impose, replace, or revoke the measure of restraint. If the accused has been remanded in custody, the judge is obliged to review at the initial court hearing whether it is necessary to leave the detention in force, regardless of whether the party has filed a motion in this respect or not. After that, the court shall review the matter once in two months, on its own initiative.[100]

Analysis of court hearings

During the reporting period, GYLA attended 161 pre-trial hearings, at which 206 defendants were brought to court from detention facilities. The court replaced the pre-trial detention imposed on defendants with bail in 14 cases. In the remaining cases, the court could not see any newly identified circumstances that would give rise to a necessity to replace the pre-trial detention and left the imprisonment imposed as a measure of restraint in effect. In 119 (85%) cases of these, the judge insufficiently or did not substantiate at all why it was necessary to leave the detention in force. Unlike the previous reporting period, the rate of unsubstantiated decisions has increased by 5 percent.[101]

It should be noted that even if the dangers for which the accused was sentenced to imprisonment have been eliminated, the prosecution does not request the replacement of the pre-trial detention with a more lenient measure of restraint. In such cases, the prosecution, the party representing the state, should be focused on not to remand in custody the person against whom the grounds for the imprisonment no longer exist.

In the reporting period, as in previous years, the periodic review of preliminary detentions was mostly formal and the court did not seek to replace the detention imposed, even if the grounds for the detention can be gradually neutralized and

100 Criminal Procedure Code, Article 219.

101 Criminal Court Monitoring Report N14, p.39. (2020).

the need to leave it in effect may no longer exist after some time.

One judge replaced the imprisonment of the defendant with bail after seeing that the accused made the evidence irrefutable.

For the illustration, please see the following example:

> The person was accused of committing a crime under Article 126(1) of the Criminal Code.[102] He had already been imposed custodial bail as a preventive measure. At the preliminary court hearing, the prosecutor referred to the same threats allegedly posed by the defendant that he or she mentioned during the first appearance hearing and demanded to have the defendant remanded in custody. The defendant explained that if the judge released him on bail, he would make every effort to post the bail. The court ruled that the detention was unreasonable and applied a reduced amount of bail as a measure of restraint against the accused. The judge explained it as follows- "*I do not think that the defendant should remain in custody, since the evidence in the case is indisputable, which means that the case can be resolved in one day, and the fact that the accused has not been able to pay the bail proves only one thing to me that he does not have sufficient funds."*

During the reporting period, GYLA was observing one of the case proceedings, during the merits hearing of which the decision to leave the detention imposed as a measure of restraint unchanged was appealed by the defense lawyer to the Investigative Panel of the Court of Appeals. The Court of Appeals rejected the submission and explained that "*the current procedural law excludes the authority of the Investigative Panel of the Court of Appeals to review an appeal concerning a ruling delivered as a result of the main hearing dedicated to the revision of the measure of restraint."*[103] Although the procedural law guarantees that the necessity for the preliminary detention imposed as a measure of restraint shall be reviewed at least once every two months at the substantive hearing stage of the case proceeding,[104] we believe that it should be possible to have a decision rendered by a certain judge be evaluated in a higher court before a final verdict is delivered. The so-called dual control will greatly reduce the risk of leaving a person in unjustified custody prior to sentencing.

102 Beating or other violence that caused physical pain to the victim but did not result in intentional minor damage to bodily health.

103 The explanation of the Court of Appeals concerning the inadmissibility of N.M.'s application, available at: http://www.tbappeal.court.ge/?news=967&mc=1. [07.08.2021].

104 Criminal Procedure Code of Georgia, Article 230[1] (1)

Cases of alleged ill-treatment by law enforcement bodies

In 2019, Article 191[1] of the Criminal Procedure Code entered into force[105] to ensure a more effective response of the court to alleged cases of torture, degrading and/or inhuman treatment. Due to the regulations introduced as per the Covid-19 pandemic, mobility on the streets decreased, which soared the number of investigative actions carried out by law enforcement without eyewitnesses to be present. It should be noted that prior to the first appearance court hearings, defense attorneys were often unable to have a preliminary communication with the accused, defendants would attend court hearings remotely, and detainees joined court sessions either from a temporary detention facility or an administrative building of the police. This, despite the best efforts of some judges, to thoroughly ensure that no outsider persons were present in the room, still entailed the risk that alleged facts of ill-treatment would remain unnoticed. The risks of non-disclosure of ill-treatment cases increased further under the pandemic conditions, as well as due to problems with the confidentiality of the communication between the accused and the lawyer. Often defendants were hardly able to speak openly when communicating with their lawyers on the institution's telephone, not to say anything from a penitentiary building during a remote court hearing.

According to the 2020 report prepared by the State Inspector's Office, in 82% of the investigations initiated by the Inspector's Office, the alleged victims named employees of the Ministry of Internal Affairs as alleged offenders, in 17% - employees of the Special Penitentiary Service of the Ministry of Justice, and in 1% - officials of the Ministry of Finance Investigative Service.[106]

The analysis of the report shows that according to the complaints received by the Inspector's Office, the temporary placement facility (one complaint) seems to be the most protected area in terms of ill-treatment cases compared to other agencies. The same report states that the place of alleged cases of ill-treatment is – the street 24% (75), an administrative building of the Ministry of Internal Affairs - 19% (60), a penitentiary facility- 16% (49), a vehicle - 10% (31), etc.[107]

GYLA has reiterated the need to equip the interior of police vehicles with video

105 Article 191[1] of the Criminal Code allows a judge to apply to a relevant investigative body in response to any suspicion of torture, degrading and/or inhuman treatment of an accused/convict at any stage of the criminal proceedings.

106 The State Inspector 2020 Report, p. 148, available at: https://bit.ly/2TI8SA7. [07.08.2021].

107 Ibid. p.150

surveillance cameras to reduce the cases of violence inflicted on arrested individuals during their transportation to the police administrative units.[108]

During the reporting period, the judges in all cases asked the defendants whether they had any complaints concerning ill-treatment. In 8 cases, the accused mentioned the facts of verbal and physical abuse perpetrated by representatives of the law enforcement body, in 2 cases about the violence committed by officials of the penitentiary facility.

In 3 cases, it was proved that the defendants in the same penitentiary institution were joining the trial sharing the prison cell, while the screen, microphone, and loudspeakers were installed outside the cell. This complicated for the defendants to adequately understand the matters discussed during the trial, as well as to obtain information from the accused. In addition, 2 defendants were handcuffed during the remote hearing.

The monitoring identified one case of unethical and inappropriate response by the judge to an alleged fact of ill-treatment reported by the accused at the hearing.

For the illustration, please see the following example:

> The judge asked the accused person if he had any complaints, to which the defendant replied that two years ago, when he had perpetrated an alleged criminal act, law enforcement officers verbally and physically assaulted him, and he named a specific person. Having heard that, the judge addressed the defendant in a loud and rough tone,- "*and now you are telling me that, so what can I do about it*?," which resulted in an argument between the accused and the judge. The defendant replied that he was asked if any illegal act had been inflicted against him by the police and he answered the question as he understood it, trying to give a relevant answer. The judge responded aggressively again saying *that he should have appealed to the General Inspection and not to the court about such matters*. Once the defendant said that he did not know he "ought not" to talk about such things in court, the judge called on the prosecution to respond.

Since May 2019, if at any stage of the criminal proceedings the judge develops a suspicion that the accused/convict has been subjected to torture, degraded

108 Prevention of Torture and Degrading Treatment (2020), available at: https://bit.ly/2TI8SA7. [08.08.2021].

and/or inhuman treatment, or if the accused/convict himself has told the court thereupon, the judge shall refer to a relevant body for response. Although the above-mentioned defendant allegedly spoke about the fact committed before 2019, the judge's unethical attitude creates an unfavorable environment, deprives the accused of his confidence in the judicial system and forces him not to disclose the facts of alleged violence he has been subjected to.

During one of the first appearance court hearings held remotely, the defendant who was joining the hearing from the administrative building of police had visually perceptible injuries on his face. The judge asked the police officers attending the hearing to leave the room. After getting convinced that only the accused was in the room, the judge asked him in what circumstances he had received the injuries and whether he had been subjected to violence. The defendant explained that he had received the injuries as a result of the fall. It should be appreciated that the court used the opportunity of confidential communication at its disposal, however, leaving the room does not mean that the individuals staying behind the door are not eavesdropping on what the accused might be talking about.

GYLA believes that virtual participation in the court hearings from penitentiary facilities and police units increases the likelihood that in the event of alleged violence committed by members of the staff, the accused will refrain from providing information to the court for fear of psychological pressure or further physical violence from the same and/or other staff members.

PLEA AGREEMENTS

INTRODUCTION

The judge, after reviewing a motion to render a ruling without a main hearing, is entitled to adjudicate the case without a merits hearing, to return the case to the prosecutor, or to hear the case on the merits in accordance with this law.[109]

If the court decides that the evidence is not sufficient to resolve the case without a substantive hearing under Article 11^1(3) of the Criminal Code, or finds that the prosecutor's motion to adjudicate without a substantive hearing is in breach of other requirements of this chapter, it shall return the case to the prosecutor. Prior to returning the case to the prosecutor, the court offers the parties, during the hearing of the motion, to change the terms of the plea agreement, which must be agreed with the superior prosecutor. If the court does not accept the amended terms of the plea agreement, the judge may return the case to the prosecutor.[110]

GYLA has been monitoring plea agreement hearings for years and analyzing the extent to which strict judicial oversight is exercised over the agreements reached between the parties. The plea agreement is a means of a speedy administration of justice only if the relevant preconditions are met. Given the fact that most cases are resolved by plea agreements,[111] this mechanism plays an important role in Georgian justice. The significance of the plea agreement is due to the fact that it saves human and financial as well as time resources. As a result of the plea agreement, the verdict is reached, so it is important that all procedural rules be followed accordingly.

Identified trends

In the reporting period, GYLA attended 278 plea agreement court hearings involving 305 defendants.

109 Criminal Procedure Code, Article 213 (1).

110 Criminal Code, Article 212 (6^1).

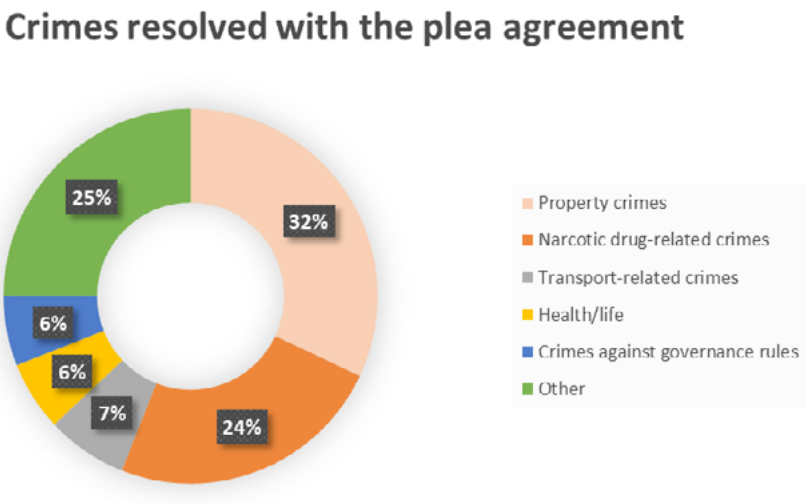
111 In 2020, 63% of the cases deliberated by the court were resolved with a plea agreement, available at: http://www.supremecourt.ge/files/upload-file/pdf/2020w-statistic-3.pdf [Last viewed: 08.08.2021].

The observations of the trials show that in most cases, the plea agreement is signed at the first appearance court hearing (188 cases, which is 68% of the plea agreements), and in the remaining 32% - at the later stages of the case proceedings. When the accused first appears before the court and his or her case is heard at the trial, the issue of a thorough explanation of the rights to the accused, the conduct of the case proceedings with full procedural guarantees and the provision of effective judicial control become even more important.

The plea agreement is most commonly concluded for property offenses (89 agreements, 32%) and narcotic drug-related offenses (67 agreements, 24%). Pleas on transport crimes are also common - (20 agreements, 7%).

In the chart below, you can see the types of offenses for which the plea agreement was reached from March 2020 through March 2021.

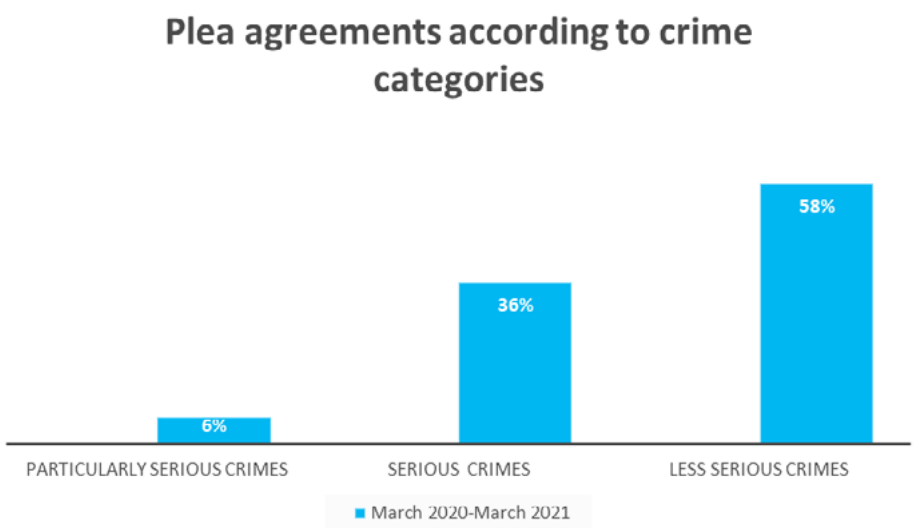
Chart №13



Speaking of the categories of crimes, plea agreements are mostly signed into less serious (161) or serious crime (101) cases, and in rare cases for particularly severe crimes (16 cases).

The following chart shows the GYLA's court monitoring data regarding the categories of crimes for which the plea agreement was signed from March 2020 through March 2021.

Chart №14



Among the particularly serious criminal cases for which the plea agreement was signed, narcotic drug-related offenses and/or drug crimes in combination with other offenses prevail (13 cases), with only two cases of attempted manslaughter and misappropriation or embezzlement in large quantities.[112] One case concerned an attempted murder and illegal carrying of firearms.[113]

In one case a person accused of injuring three individuals was charged with violent crimes - violence (Article 126 of CC), minor damage to bodily health (Article 120 of CC) and attempted murder (Article 19,108 of CC). The case had three victims, but the judge concluded the plea agreement without even seeking the consent of the victims at the court hearing. The court finally sentenced the accused to 8 years of imprisonment, of which four years in a penitentiary facility and four on probation.

In the reporting period, the Prosecutor's Office approved almost all plea agreements. Only 1 case was reported where the judge doubted the qualification of the crime and did not approve the plea agreement.

112 The crime envisaged by Article 182 (3)(b) of CC.

113 The crime envisaged by Articles 19, 108 of CC and Article 236(3)(4) of CC.

For the illustration, please see the following example:

> The person was charged with committing a crime under Article 273^1, Paragraph 1 of CC, which involves an illegal purchase, storage, transportation and/or forward of a small amount of plant cannabis or marijuana, committed by a person sentenced to an administrative fine or convicted for committing an administrative offense as per the Article 45^1, paragraph 1 of the Code of Administrative Offenses of Georgia. As the judge held, the conviction under Article 273^1, Paragraph 2 of the CC does not constitute the conviction defined for the composition of the act as provided for in the first paragraph of the same Article. The wording of Article 2731, Paragraph 1 of the CC, "by a person convicted of this crime" refers only to a person sentenced under Article 273^1, Paragraph 1, and not to a person convicted under any paragraph of Article 273^1.

There were several instances where the accused complained about the sentence provided for in the plea agreement and requested the judge to change the terms. There were also cases where the defendants either did not fully comprehend the composition of the indictment based on which the plea was reached or agreed despite clearly contradictory circumstances.

For the illustration, please see the following example:

> The problem in this particular case concerned the non-acceptance of the charges brought against the defendant. The person was accused of stealing a mobile phone and a credit card. As it turned out the credit card had been placed inside the "case" of the mobile phone and the accused removed it and threw the "case" away together with the card without even knowing about it. The prosecutor confirmed that the matter with the credit card was separated as another case proceeding and an investigation was underway, as other individuals reportedly were using the credit card and the accused had not done any transactions with it. The judge tried several times to confirm whether the accused fully admitted to the charge (the theft of both items) or partially (only the phone). Eventually, the defendant declared that he fully admitted to it because the investigation had so decided. However, given that the accused had not known about the card, the goal of the unlawful misappropriation must have also been ruled out. The impression was created that the accused fully pleaded guilty only for the purpose of concluding the plea agreement and did not actually agree with the accusation on the part of stealing the credit card.

In such cases, the objective observer develops the feeling that the terms of the plea agreement do not necessarily reflect the will of the accused, and the latter is forced to agree to the terms proposed by the prosecution, which the defendant finds unacceptable, in order to avoid a harsher sentence.

The court must exercise strict judicial control over the plea agreements and refrain from approving them unless the court becomes convinced in the truthfulness of the will of the accused, as well as if the court considers the sentence provided for in the plea agreement is severe or unfair.

INFORMING THE ACCUSED OF THE RIGHTS RELATED TO THE PLEA AGREEMENT

Just like other court hearings, at a plea agreement court trial, the judge informs the accused of his or her rights envisaged by law, clarifies all matters directly linked to the conclusion of the plea agreement under Article 212 of the Criminal Code, as well as inquires whether the plea is accepted voluntarily, whether the defendant pleads guilty to the charge, and whether he or she has received qualified legal counseling, etc.

Identified results

The observations of court hearings have revealed that the judges did not fully inform the defendants of their rights[114] at the plea agreement trials in 27% of cases,[115] which is a 7 percent improved index compared to the previous period.[116]

As regards the matters directly related to the plea agreement - the questions specified in Article 212 of CC - the judge failed to ask them in 80 (26%) cases, namely, whether the defendant had been subjected to torture or inhuman or degrading treatment by law enforcement officials; In 51 (17%) cases, the judge did not inform the accused that if the court does not approve the plea agreement, it is inadmissible to use in the future against the accused any information he or she has provided to the court during the review of the plea agreement.

114 Here is meant only informing the accused of his or her rights at the opening of the hearing rather than those directly related to the plea agreement.

115 In 59 cases out of 220.

116 In the previous reporting period, this rate amounted to 34%.

HASTY REVIEW OF PLEA AGREEMENTS

A motion to adjudicate without a merits hearing is discussed and a plea agreement is approved at an oral court hearing in an open and public session with the participation of the parties. It is important that the case should be heard in full compliance with the rules of procedure because the plea agreement, which does mean speedy justice, ultimately provides the ground for the verdict.

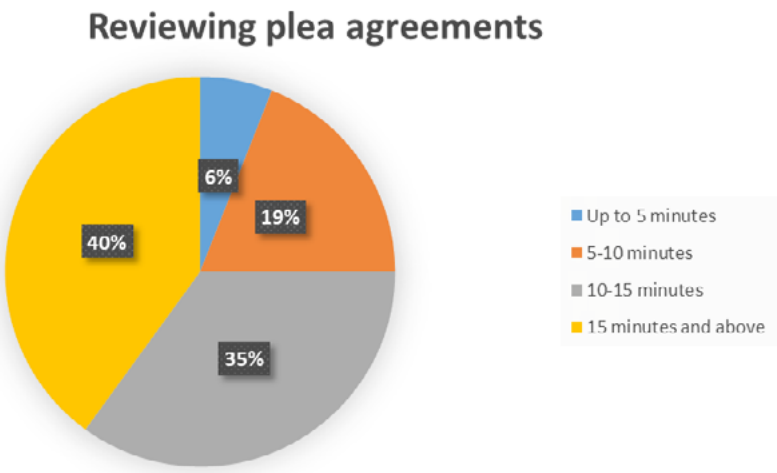
Identified trends

During the reporting period, the issue of finalizing the plea agreement hearings within minutes was even more apparent. In 15 cases, the length of the plea agreement hearing did not exceed 5 minutes. Of these, five trials lasted for 1 minute, where the judge merely inquired if the parties had any objections and then directly announced the terms of the agreement reached.

The court cannot exercise proper judicial control over the plea agreement if the judge does not hear the case, does not ask the defendant any questions as provided in the law, and does not perform the function of controlling and inspecting body over the plea agreement, and merely acts as a formal witness.

The chart below shows the length of plea agreement court hearings from March 2020 through March 2021.

Chart №15



Besides, in 60 (22%) cases, the circumstances of the case were not voiced at the trial and only the resolution part of the motion was presented, which is a 4 percent increase compared to the previous reporting period.[117] In 12 of these cases, the judge did not even let the prosecutor present the motion and read out himself/herself only the terms of the plea agreement.

LAWFULNESS AND FAIRNESS OF SENTENCES

In merely 30 (11%) out of 278 cases did the judge scrutinize whether the sentence indicated in the plea agreement was lawful or fair.[118] In the remaining cases, the plea agreement was approved without having the matter touched upon.

In the reporting period, as in previous years, a trend expressed in signing a plea agreement in minor importance cases was maintained. In these cases, the Prosecutor's Office could have imposed alternatives to criminal prosecution but preferred to prosecute the defendants.

For the illustration, please see the following examples:

- A person was charged with the crime under Article 177(1) of CC, stealing of "Sarajishvili" cognac worth 29 GEL, for which the accused was imposed the fine in the amount of 1000 GEL.

- On 23 August 2020, the accused F.N. stole 23 GEL belonging to the victim from an Opel car, for which he was charged with Article 177(2)(B) of CC. The convict was sentenced to 1 year of imprisonment, which was considered as suspended with the same period of probation.

SENTENCES IMPOSED

The analysis of court trials shows that most often as a result of a plea agreement, a suspended sentence (25%), a suspended sentence with a fine (20%), or a fine (15%) are used as the punishment. Compared to the previous year, the number of cases imposing community service as a form of punishment has further decreased (5%).[119]

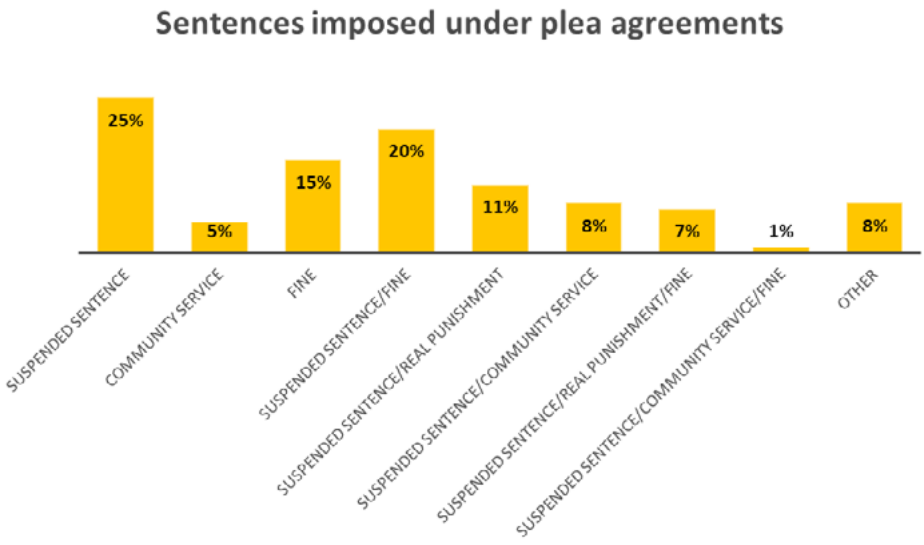
117 In the previous reporting period, this rate amounted to 18%.

118 This figure compared to the previous reporting period has increased by 2%.

119 In the previous reporting period, the rate was 7%.

The chart below shows the sentences imposed as a result of plea agreements from March 2020 through March 2021.

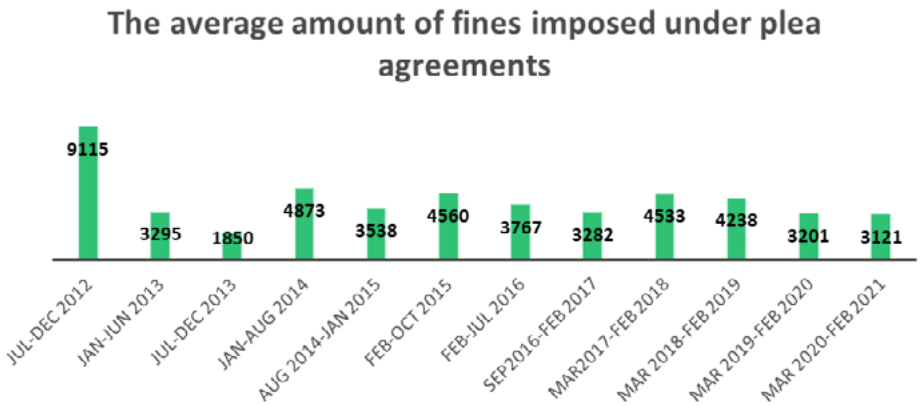
Chart №16



In the current reporting period, the trend of the last three years was maintained - the average amount of fine applied as a result of the plea agreements was further reduced compared to the previous year and was set at GEL 3121.

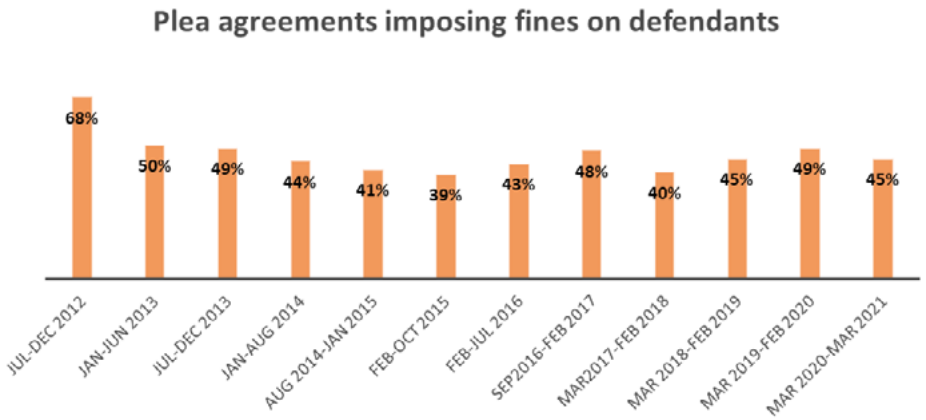
The following chart shows the average amounts of fines imposed under plea agreements from July 2012 through March 2021.

Chart №17



The chart below shows the percentage of fines applied as a result of plea agreements in the period from July 2012 through March 2021.

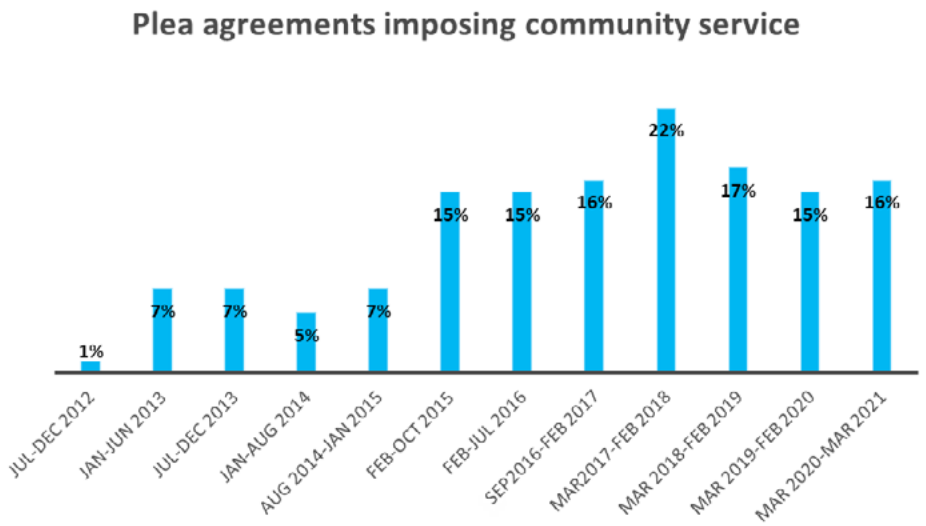
Chart №18



The rate of imposing community service as a punishment has not changed and has increased by only 1 percent compared to the previous reporting period.

In the chart below, you can see the rate of imposing community service as a result of plea agreements from July 2012 through March 2021.[120]

Chart №19



120 The data includes the total number of either the separate use of community service or in combination with other sentences.

THE HEARING ON THE MERITS

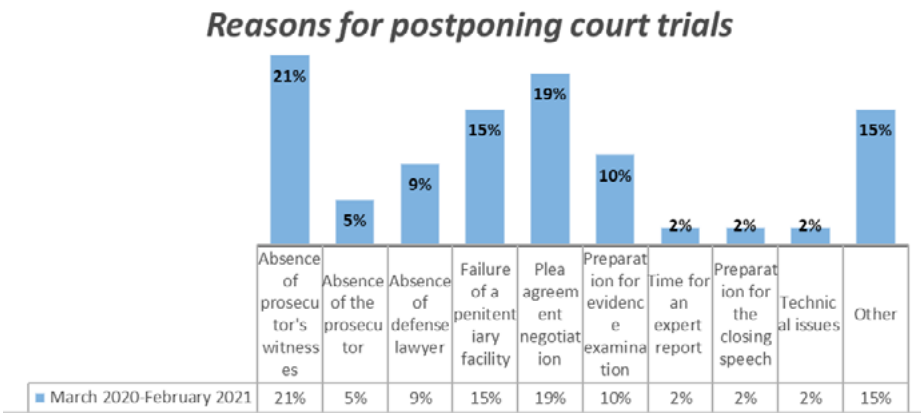
DELAYED, SUSPENDED, AND POSTPONED TRIALS

Postponed, delayed and lengthy court trials were more acutely felt during virtual case proceedings, the reason for which was the issues related to the remote trials.

Of the 993 main court hearings, 412 (42%) were **adjourned**. Most frequently the reason for postponing and delaying the court hearing was the failure of the prosecution to present witnesses or the conclusion of a plea agreement. Besides, most commonly court trials were suspended or delayed due to the failure of penitentiary facilities to ensure the involvement of the accused in the virtual hearing. In particular, due to insufficient computer equipment and technical problems, defendants had to queue to join their trials and for this reason, the launch of the hearings was delayed in 135 (27%) out of 471 court proceedings. Among the causes for the delay, prevalent was the late appearance of the judge in 61 (13%) cases, and deliberating other case proceedings in 54 (12%) cases.

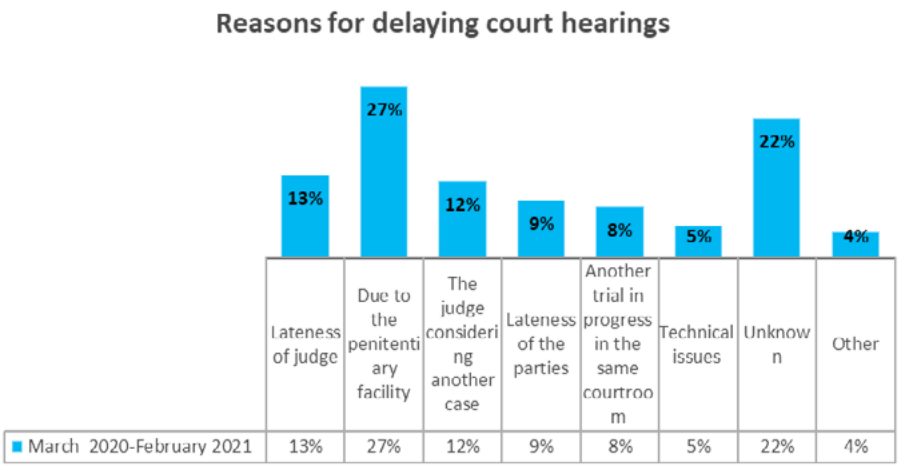
The following chart shows the reasons for postponing court trials from March 2020 through March 2021.

Chart №20



The following chart shows the reasons for the late opening of court trials in the period from March 2020 through March 2021.

Chart №21



The monitoring has confirmed that in 176 (37%) cases, the court hearings were delayed by **one hour and/or more**, which is rather a high rate. The suspension of trials is mainly caused by the penitentiary services, which are not equipped with sufficient technical means to ensure smooth virtual sessions. In 13 cases, the commencement of the trial was delayed for more than 3 hours.

VERDICTS

In the reporting period, GYLA attended the merits hearings against **161 individuals** where the court delivered the ruling. Of these, **130 (80%)** were guilty verdicts, **27 (17%)** - acquittals, and **3%** were partial acquittals. In one case, the judge reclassified the charge to another article, namely, the judge did not consider the charge against the accused as to be theft (Article 177 (3) (d) (4) (b) of CC)) and reclassified it as an arbitrary act (Article 360(1) of CC). In another case where a person was accused of violence (Article 126 (1) of CC) and of damaging or destroying an item (Article 187 (1) of CC), the judge terminated the criminal prosecution on the basis of the Amnesty Act of January 2021.

In the current reporting period, the rate of acquittals has increased by 4 percent compared to the previous reporting period.[121] Of the acquittals, 11 (41%) concerned domestic violence crimes, where the victims refrained from testifying against a close relative, which ultimately led to the acquittal of the defendants.

In the majority of domestic crime cases, the victim's statement is the key evi-

121 In the previous reporting period, defendants were acquitted in 13% of cases.

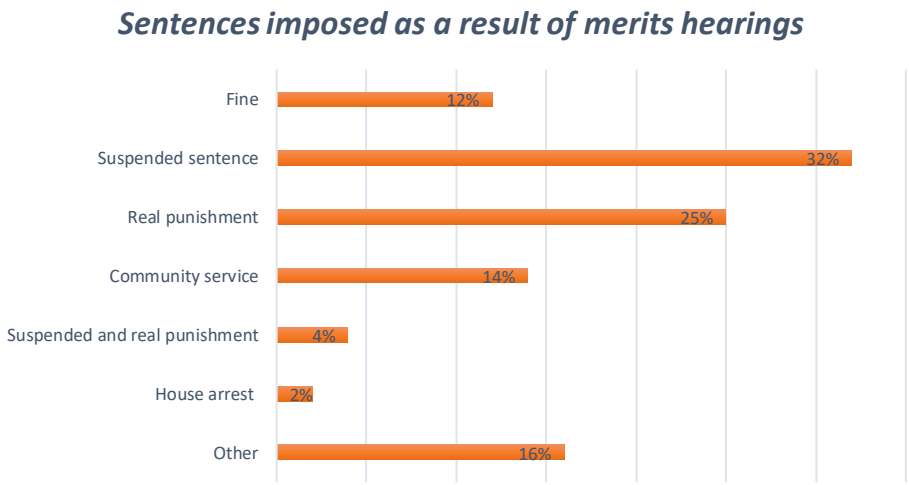
dence as other direct evidence is hardly available in the case, which is due in part to the specifics of domestic crimes. Therefore, the investigation must be diligent in obtaining evidence by all possible legal means, so that the final outcome of the case does not depend solely on the testimony of the victim.

SENTENCES IMPOSED

As a result of the hearings on the merits, the court in the current reporting period most frequently sentenced defendants to imprisonment, which was considered as suspended in 32% of cases, while real imprisonment was actually used against 25% of convicts. In 2% of the cases, house arrest as a punishment was reported.

The chart below shows the results of the GYLA's court monitoring concerning the sentences imposed as a result of the merits hearings from March 2020 through March 2021.

Chart №22



DOMESTIC CRIMES

INTRODUCTION

The constraints imposed by states to fight against the spread of the Coronavirus, self-isolation, the majority of the population staying home, and the tense psychological background have contributed to an increase in domestic violence cases since many people found themselves to be living with a potential abuser under the same roof.

Women and girls already in the abusive environment are more exposed to control and restrictions by abusers in the current situation.[122] The COVID-19 pandemic caused economic and social hardship, leading to a growing trend of violence against women globally.[123]

Identified trends

It is alarming that 7 of the domestic crime cases monitored by the GYLA were related to murder or attempted murder. In these cases, as well as in domestic crime cases in general, the victims were mostly women. In particular, in 6 of the 7 cases, the victim was a woman, and in one case, the monitor was not able to find out the sex of the victim because the information was not disclosed at the hearing.

One case concerned a woman brutally murdered by her husband, in particular, the woman, who arrived at the Civil Registry Agency to apply for divorce, was stabbed to death by her spouse. There was attempted murder with particular brutality when a man splashed petrol onto his partner and set her on fire.[124]

122 The Office of the United Nations High Commissioner for Human Rights, "COVID-19 and Women's Human Rights: Guidance", 2020, p. 2, Available: https://bit.ly/2SBWl0z [Last viewed: 09.08.2021]

123 UN WOMAN, Efforts intensify to confront pandemic-related spikes in violence against women across Europe and Central Asia, available at: https://bit.ly/3cIuoel [last viewed: 09.08.2021].

124 The accused was charged with special cruelty for the attempted premeditated murder of a family member. Eventually, the court handed down a guilty verdict in the case.

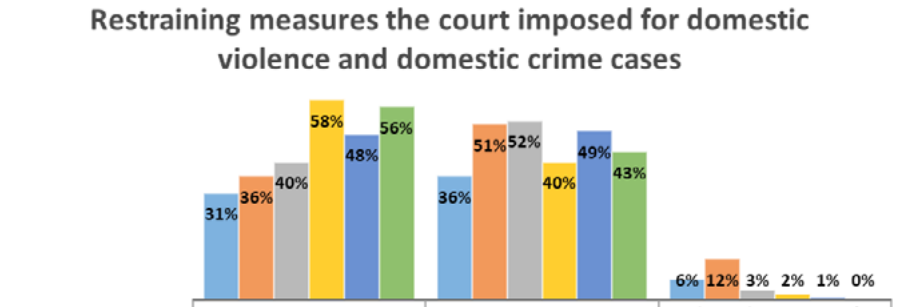
MEASURES OF RESTRAINT

GYLA attended 396 first appearance court hearings during the reporting period, of which 102 (26%) were domestic violence and domestic crime cases. Literally, every fourth court hearing deliberating a preventive measure attended by the GYLA monitors concerned the above type of crime.[125]

The **Prosecutor's Office,** as in previous periods, still maintained a strict approach to the category of crime, mostly by requesting the court to use pre-trial detention. In 98 out of 102 (96%) cases, the prosecutor demanded custody for the accused, which is a further increased rate compared to the previous reporting period,[126] while in the remaining 4 (4%) cases, bail was requested.

The chart below shows the types of restraining measures imposed by the court in domestic violence and domestic crime cases from July 2012 through March 2021.

Chart №23



	Imprisonment	Bail	Alternative measure of restraint
Feb.-Jul 2016	31%	36%	6%
Aug 2016-Feb 2017	36%	51%	12%
Mar 2017-Feb2018	40%	52%	3%
Mar 2018-Feb 2019	58%	40%	2%
Mar 2019-Feb 2020	48%	49%	1%
Mar 2020-Mar 2021	56%	43%	0%

Unlike the prosecution, the **court** imposes less stringent measures, although it should be noted that the application of pre-trial detention has increased by 8 percent compared to the previous reporting period. The court ordered imprisonment in 57(56%) out of 102 cases, bail in 43 (42%) cases, and released the accused without a restraining order in 2 (2%) cases. In one case from the latter,

125 The number of such crimes was similarly high in preliminary hearings, where 131 (30%) of the 444 cases monitored by the GYLA concerned domestic violence and domestic crimes.

126 In the previous reporting period, the Prosecutor's Office requested imprisonment in 87% of cases of domestic crime and domestic violence cases.

the defendant had already been in custody for another crime, and in the second case, according to the accused, the victim's testimony did not reflect reality, the victim had mental problems, which was confirmed by the fact that the victim was receiving medical treatment at the relevant institution. Having heard the opinion of the accused, the judge asked the prosecutor if he or she had studied the mental health of the victim. The prosecutor confessed to not having such information, after which the judge left the accused without a restraining measure.

The judge must take into consideration the safety interests of the victim of the crime when deciding on the measure of restraint into these types of crimes.

For the illustration, please see an example showing the judge's decision lacking the considerate attitude towards the best interests of the victim:

> The person was charged with threatening a family member (Article 11^1, 151(2) (d) of CC). The prosecution demanded to use preliminary detention as a measure of restraint. The accused declared at the hearing that the victim had "mental problems". The judge, after hearing the position of the defendant, asked the prosecutor if he or she had examined the victim's mental state. The prosecutor said that he or she had no information about it. The judge then explained that the health condition of the victim had to be studied, and left the accused without a preventive measure.

We believe that the health status of the accused and the victim cannot serve as the ground for imposing or refusing to impose the measure of restraint but must become the subject of further deliberations. The fact that the victim may have had a mental health problem did not preclude the possibility of an alleged crime having been committed against her. By leaving the accused without a measure of restraint, the judge further exposed the victim to an increased risk of a new crime. In the given case, it should be noted that having refused to impose any form of restraint on the accused, the court deprived itself of the opportunity to apply any additional obligations on the defendant, such as prohibiting the accused to approach the victim and her residence, leaving, therefore, the alleged victim completely unprotected.

The cases in which the court, with the view to protecting the potential victim of a violent crime, imposes additional obligations apart from a measure of restraint, such as the prohibition to approach the victim and her residence, should be highly appreciated.

HEARINGS ON THE MERITS

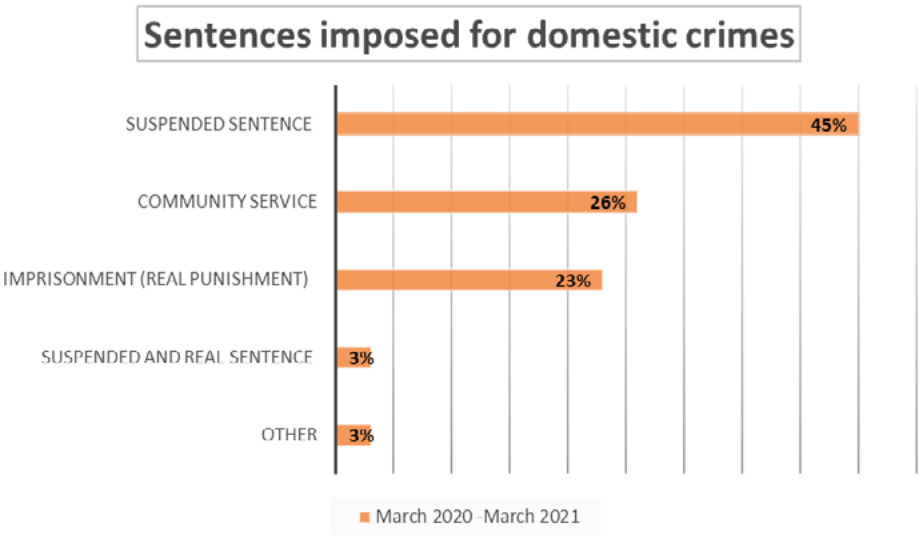
25% of the merits court hearings (257 out of 1043) attended by the GYLA monitors were related to domestic violence (Article 126[1] of CC) or domestic crime (Article 11[1]). As it turns out, like the preventive measure hearings, every fourth main court hearing deals with the above category of crime, which indicates its prevalence.

During the reporting period, 49 cases of domestic violence or domestic crime cases were adjudicated. In 36 cases (74%) the verdict was guilty, 11 (22%) acquittals and 2 (4%) were partial acquittals.

Speaking of the sentences imposed for domestic crimes, the court most frequently used suspended sentences for domestic abusers - 17 (45%), as well as community service - 10 (26%); imprisonment in the form of a real sentence was imposed on 9 persons (24%), and in 1 (3%) case, the convicted person was ordered to a suspended sentence and a real punishment together, other types of punishment were imposed in merely 1 (3%) case.

In the chart below, you can see the sentences imposed as a result of merits consideration of domestic crimes from March 2020 through March 2021.

Chart №24



PLEA AGREEMENTS INTO DOMESTIC CRIMES

The strategy of the Prosecutor's Office to maintain a largely strict approach to domestic crimes and domestic violence cases is preserved. Only in exceptions does the prosecution use lenient terms with regard to domestic offenses and rarely concludes a plea agreement with abusers. The GYLA monitors attended 278 plea agreement hearings, of which only 2 were domestic violence cases.

For the illustration, please see the following example:

- The accused person perpetrated domestic violence, an offense under Article 126^1, paragraph 1 of CC. According to the indictment, during a conflict on household grounds in the house, the mother inflicted physical pain on her daughter by squeezing and scratching her neck.

As a result of the plea agreement, the accused was sentenced to community service for a period of 150 hours.

- In the other case, the defendant was charged with Article 126^1, paragraph 2, subparagraph "a", for domestic violence with prior knowledge of a minor child. The defendant was sentenced to 1 year of imprisonment, which was considered as a suspended sentence with the same period on probation. It remained unknown to the monitor what criminal act the accused exactly committed, as the prosecutor presented only the operative part of the motion at the hearing and did not elaborate on the factual circumstances of the case.

In both cases, the defendants were women and, presumably, this became the basis for imposing the lenient terms on them.

THE COURT'S RESPONSE TO THE SITUATION OF VICTIMS OF DOMESTIC VIOLENCE

Female victims are particularly vulnerable, as they develop fear and refuse to testify against an alleged offender once the case proceeding is initiated. Frequently not only from the law enforcement authorities but also from the public the victims do not receive the proper support.

The court must prevent marginalizing, public shaming and secondary victimization of victims during the court proceedings.

For the illustration, please see the following example:

> In one case, the impression was created that the defense lawyer was trying to morally embarrass the victim with questions and assessments completely unrelated to the case. The lawyer asked the victim if she had ever had an abortion, and when the victim replied that she had had an abortion with the consent of the defendant, the lawyer criticized her by saying- "God gave you a child, and what made you get rid of it."

> The judge did not dismiss the abortion-related questions even though they had no connection with the case being deliberated, nor did he or she make any remarks concerning the lawyer's accusation.

On the other hand, a positive example of the judge's response was reported when the judge took steps to avoid secondary victimization of the alleged victim.

For the illustration, please see the following example:

> In one case of domestic violence (charge under Article 126[1], paragraph 1 of CC), the victim, who was being interviewed at the trial, told the court that she would not want to see the accused during her testimony.

> The judge granted the victim's request and since the defendant was remotely joining the hearing while the other participants were present in the courtroom, the judge turned off the defendant's screen and microphone. The judge also turned off the screen installed in the courtroom so that the victim could not see the defendant while the other participants of the proceedings were able to see the defendant. Besides, the judge told the accused to indicate by raising his hand if he encountered any issues. The virtual trial allowed the court not to remove the accused from the courtroom, as is often the case in general, who could still hear the testimony of the witness and observe the interrogation process. At the same time, the interest of the victim was ensured and she was not obliged to see the accused while giving her statement.

During a hearing, the court should make effort to ensure that the participation in the criminal proceedings is painless for the victims, that they are able to testify impartially and are not under fear or any psychological influence, and feel protected against secondary victimization or psychological trauma during the hearing. One of the most effective means of ensuring the same apart from removing the accused from the courtroom and/or using the protective barrier - shield -

to prevent the eye contact between the victim and the accused during the trial in the courtroom is the remote involvement of the defendant. Through specific technical means, it is possible to guarantee that the accused hears the testimony of the victim while the victim does not see the offender during the virtual hearing. This will, on the one hand, guarantee the safety of the victim and, on the other hand, the right of the accused to participate in the hearing of his case.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION

All stages of the reporting period were accompanied by the changes dictated by the Covid-19 pandemic. The participants and observers to criminal proceedings were forced to shift much of their day-to-day activities to the electronic platform and to keep up with the proposed constraints so as not to infringe on the rights of the accused in the criminal proceedings.

The monitoring showed that the challenges with virtual court hearings, such as the **problem of publicity and access to** remote proceedings, **technical issues** associated with remote court trials, problems with the **examination of evidence** and interviewing witnesses at virtual hearings, as well as ensuring the **confidentiality of communication** between the accused and defense lawyers were added to other problems observed in the reporting period.

The judiciary must effectively handle the novelties imposed by the pandemic; the need for periodic **remote hearings** should not impede the effective functioning of the judiciary, the court must ensure the publicity of trials, protect the procedural rights of defendants, and fundamental principles of criminal justice. Based on this experience, the shortcomings that occurred at the initial stage should be rectified and all necessary resources should be timely found to address them. Besides, the rules of procedure for conducting virtual criminal hearings should be defined in the criminal procedure law.

At the **first appearance court hearings** - the indiscriminate use of bail and imprisonment as a measure of restraint is still a problem. The rate of imposing unsubstantiated restraint measures is soaring. This suggests that the prosecution and the court do not assess the individual circumstances of the case when selecting a preventive measure. This is especially obvious in relation to the amount of bail.

The COVID-19 pandemic complicated the communication between the accused and the defense lawyer and threatened the security of their communication. This was a particularly acute problem in terms of alleged ill-treatment cases. We believe that against the background of the lack of preventive measures, defense lawyers must work harder to better communicate with potential sureties.

The **lawfulness of detention** is rarely examined in a public hearing, which is still a problem. During the reporting period, the need to discuss the legality of the detention at a public hearing was further highlighted, as well as the necessity to audio-video record the arrest procedure.

At the preliminary court hearings, the efforts of the defense to presenting evidence further decreased. However, it should be positively highlighted that if in the past the defense side presented mainly the personality characteristics of the accused and rarely the interrogation protocols as evidence, in the current reporting period, there were cases when the defense lawyers presented expert examinations commissioned at their own expense, witness examination, and examination protocols, etc. **We believe that the presentation of alternative evidence has a positive effect on the quality of the adversarial process.**

The observations of plea court hearings have confirmed that the court is even less likely to discuss whether the sentence provided in the plea agreement is lawful or fair. The court, in several cases, formally approached the approval of the plea agreement and signed it without thoroughly scrutinizing the circumstances related to the plea agreement at the hearing. Several instances were reported where the judges approved the plea agreement within literally 1 minute.

The consideration of cases within unreasonable timeframes remains an unresolved problem **at merits hearings**. The increase in cases of postponement and delayed commencement of trials was also caused by the shortcomings associated with the remote case proceedings. The cases of delays of more than an hour were critically high, which significantly hindered the performance of the court.

The number of acquittals has increased in the reporting period, which is partly due to the verdicts delivered in domestic crime cases.

The prosecution maintains a strict policy towards **domestic crimes** and hardly ever enters into a plea agreement for the type of crime, nor does it use lenient terms. For domestic crimes, the Prosecutor's Office for the most part still petitions for the use of pre-trial detention as the most severe measure of restraint. In turn, in the given reporting period, the rate of ordering by the court imprisonment for those accused of domestic crimes increased by 8 percent.

RECOMMENDATIONS

Based on the monitoring results, the organization has prepared the following recommendations for the attention of relevant bodies:

For common courts

- Courts should make efforts to ensure maximum publicity and access to hearings even in the pandemic conditions, to involve court monitors and interested parties in trials in the courtroom and/or by electronic means.
- The court should thoroughly examine evidence and interrogate witnesses in the courtroom, especially in the cases where the parties are requesting so.
- The court must ensure that information about hearings, including the defendant's first court hearing, is posted on the court's website.
- Judges should use the discretion granted upon them concerning restraining measures, and impose less severe measures on the accused (alternative measures other than imprisonment and bail) or refuse at all to use them when the prosecutor's motion is not sufficiently substantiated.
- Courts should require the prosecution to properly substantiate a motion requesting a restraining order and impose the burden of proof on the prosecution.
- The court must devote sufficient time resources to the consideration of the plea agreement, conduct the plea agreement hearings in accordance with the relevant procedures, and exercise strict judicial control over the lawfulness and fairness of the sentence.
- The judge should refrain from approving a plea agreement if he or she becomes convinced that the terms set out in the agreement are not acceptable to the accused and/or the court develops suspicion about the genuineness of the defendant's will to plead guilty.
- The court must try to prevent secondary victimization, public shaming, and marginalization of victims into domestic violence cases when considering domestic crimes.

- Confidentiality of communication between the defense lawyer and the accused must be guaranteed during remote court trials. The information disclosed during the closed court hearings must be protected to the maximum extent possible.

- In order to increase the involvement of the defense, the judge should publicly discuss the legality of the detention and establish a high standard in terms of preventing the restriction of human rights.

- The judge should thoroughly and clearly inform the accused of his or her rights provided by law, especially when the person is not represented by a lawyer.

- The court must give the parties the opportunity to examine the evidence, especially interview witnesses for the most part in the courtroom.

For the Prosecutor's Office of Georgia

- The prosecution must ensure that law enforcement officials do not join remote court hearings from the police stations so that to disperse the doubts that police employees might be listening to the testimony of a witness and, in general, to enhance the impartiality and credibility of such witnesses.

- Prosecutors should present the reasoning behind a requested restraining measure based on the circumstances of a particular case, the personal characteristics of the accused, and the threats posed by him or her.

- Prosecutors should better substantiate the necessity and expediency of imposing a specific preventive measure, as well as explain why other less stringent measures cannot ensure the achievement of relevant goals.

- Prosecutors should substantiate the amount of bail demanded and study the property and financial capabilities of the accused.

- In the absence of proper grounds for pre-trial detention, the prosecution should initiate to replace the imprisonment with a less severe measure of restraint.

For Parliament of Georgia

- Introduce legislative amendments in relation to Article 199(1) of the Criminal Procedure Code and increase the number of major preventive measures.

- Amend the Criminal Procedure Code of Georgia to exempt the restraining measure - the agreement on not to leave the country and to behave appropriately – from the dependence on a sentence or a category of crime committed.

- Modify the provision in the law and clearly indicate that "bail secured with pre-trial detention" must be "enabling" for a judge rather than – "binding," and non-custodial bail should be applied to arrested defendants.

- The mechanisms and procedures for reviewing the lawfulness of detention should be governed by law. The duty of the judge to always check the legality of arrest at the first appearance court hearing, both in the presence of a prior warrant of the court or in urgent necessity, should be clearly stipulated.

- The Code of Criminal Procedure should be amended to define the basic rules for conducting remote court proceedings, including the procedure for the examination of evidence at virtual court hearings, so that defendants are on equal terms.

- Criminal liability for violation of certain provisions established due to the pandemic should be imposed only in case of repeated commission of a serious offense, and even in that case, it is necessary to differentiate the sentences according to the nature of the violation.

- Provide the rules for audio, video and photo recording during remote court sessions.

- The Criminal Procedure Code of Georgia should be amended to stipulate it mandatory to videotape the interrogation, arrest, and search-seizure procedure in a police administrative building. Law enforcement authorities should be equipped with technical equipment to better protect the personal information of individuals.

For the High Council of Justice of Georgia

- Provide guidelines on restraint measures to ensure that court hearings and decision-making processes are conducted in accordance with international standards. The guidelines should be clear and detailed to guarantee a uniform application of the national law and international standards across the country.

- A special area should be arranged in the court building equipped with relevant technical means for remote interrogation of witnesses from where they can attend the trials and be sure that the confidentiality of their testimonies will be protected. At the same time, the psychological pressure or dangers associated with disclosing a party's opinion that may accompany the participation of a witness in the hearing from the police station or a lawyer's office must be eliminated.

- In order to govern the participation of stakeholders in virtual court hearings within the legal framework, recommendations should be drawn up to prevent obstruction of the hearings and, at the same time, to protect the interests of the participants to the proceedings.

For the Penitentiary Department

- The penitentiary facilities should be equipped with the required number of technical means, as well as more employees should be hired and trained to ensure the smooth participation of defendants in virtual trials.

- The penitentiary facilities should ensure the protection of the accused/convicts from unwanted influences on the free expression of their will, as well as the confidentiality of the information disclosed by them during the remote trials.

- Those defendants who find it difficult to testify at a trial without direct communication with the defense lawyer should be given the opportunity to join the court hearing together with the lawyer from a penitentiary facility. In such cases, all necessary steps should be taken to minimize the risk of the spread of the pandemic.

- The confidentiality of communication between the lawyer and the accused must be guaranteed during remote court hearings and meetings.

For the Georgian Bar Association

- The Georgian Bar Association should offer training courses for lawyers so that they can develop the skills needed for participation in virtual court trials.
- The Georgian Bar Association should call on lawyers to demand as much as possible alternative measures other than imprisonment and bail in the best interests of the accused.